No. 95-1598-CFH Title: Leroy L. Young, et al., Petitioners
v.
Ernest Eugene Harper

Docketed: April 4, 1996 Court: United States Court of Appeals for the Tenth Circuit

Entry	Date	Proceedings and Orders
	Apr 4 1996	Petition for writ of certiorari filed. (Response due May 4, 1996)
	Apr 17 1996	Brief of respondent Ernest Eugene Harper in opposition filed.
	Apr 17 1996	Motion of respondent for leave to proceed in forma pauperis filed.
	May 1 1996	DISTRIBUTED. May 17, 1996
	May 20 1996	REDISTRIBUTED. May 24, 1996
	May 28 1996	Motion of respondent for leave to proceed in forma pauperis GRANTED.
	May 28 1996	Petition GRANTED. SET FOR ARGUMENT December 9, 1996. **********
	Jun 13 1996	Motion of respondent for appointment of counsel filed.
	Jun 24 1996	Motion for appointment of counsel GRANTED and it is ordered that Margaret Winter, Esq., of Washington, D. C., is appointed to serve as counsel for the respondent in this case.
	Jun 28 1996	Order extending time to file brief of petitioner on the merits until August 2, 1996.
	Jul 2 1996	Order extending time to file brief of respondent on the merits until September 27, 1996.
	Jul 12 1996	Record filed.
	Jul 19 1996	Record filed.
	Aug 1 1996	Joint appendix filed.
	Aug 1 1996	Brief of petitioners Leroy Young, et al. filed.
	Aug 1 1996	Brief amici curiae of Nevada, et al. filed.
	Aug 28 1996	Record filed.
	Sep 26 1996	Brief of respondent Ernest Eugne Harper filed.
	Oct 30 1996	Reply brief of petitioners Leroy Young, et al. filed.
	Nov 6 1996	CIRCULATED.
	Dec 9 1996	ARGUED.

95-1598 (1)

Supreme Court, U.S.
FILED
APR 4 1996
CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

LEROY L. YOUNG and
ATTORNEY GENERAL OF OKLAHOMA,
Petitioners,

v.

ERNEST EUGENE HARPER,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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April, 1996 * Counsel of Record

91pp

QUESTION PRESENTED

1. Whether the Preparole Conditional Supervision Program enacted pursuant to Okla. Stat. tit. 57, § 365 (Supp. 1990) is more similar to parole or minimum security imprisonment; and, thus, whether continued participation in such program is protected by the Due Process Clause of the Fourteenth Amendment.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

OPINIONS BELOW 2

STATEMENT OF JURISDICTION 3

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 3, 4

STATEMENT OF THE CASE 7

A. Trial Court Proceedings 8

B. Proceedings in District Court 10

C. Proceedings in the Court of Appeals 11

REASONS FOR GRANTING THE WRIT 13

A. The lower Federal courts, which frequently address the issue presented, need this Court's guidance on the issue, particularly since there is a split in the circuits on the issue 14

B. The Court of Appeals has decided the issue in a manner which conflicts with the decision of the Court of Criminal Appeals, the state court of last resort 17

C. This issue is an important issue which has not, but should be, decided by this Court 14

CONCLUSION 24

APPENDIX A 1a

Opinion of the United States Court of Appeals for the Tenth Circuit.

APPENDIX B 16a

Order Entered February 13, 1996 From the United States Court of Appeals for the Tenth Circuit Denying Rehearing and Suggestion for Rehearing *En Banc*.

APPENDIX C 18a

Order Entered February 28, 1996 From the United States Court of Appeals for the Tenth Circuit Correcting Order Dated February 13, 1996.

APPENDIX D 20a

Opinion of the United States District Court for the Northern District of Oklahoma.

APPENDIX E 38a

Opinion of the Court of Criminal Appeals of Oklahoma.

APPENDIX F 43a

Provisions of Department of Corrections Offender Management and Services Manual.

APPENDIX G 53a

Pardon & Parole Board Procedure No. 004-11.

TABLE OF AUTHORITIES

Cases Cited — Page

Asherman v. Meachum,
213 Conn. 38, 566 A.2d 663
(1989) 16

Barnett v. Moon,
852 P.2d 161
(Okla. Crim. App. 1993) 2, 8
. . . . . 9, 17, 18

Edwards v. Lockhart,
908 F.2d 299
(8th Cir. 1990) 11, 15, 18

Gagnon v. Scarpelli,
411 U.S. 778 (1973) 20

Morrissey v. Brewer,
408 U.S. 471 (1972) 8, 12, 20,
. 22

United States v. Taylor,
47 F.3d 508 (2d Cir.1995) 15, 19

Vitek v. Jones,
445 U.S. 480 (1980) 20

Wolff v. McDonnell,
418 U.S. 539 (1974) 9, 20

Statutes

28 U.S.C. § 1254(1) 3

28 U.S.C. § 2241 7

Okla. Stat. tit. 21, § 443 (1991) 22

Okla. Stat. tit. 57, § 365 (Supp. 1990) . . . . . i, 4, 19, 21

Okla. Stat. tit. 57, § 365(A) (1991) 18

Constitutional Provisions

U.S. Const. amend. XIV (Section 1) 3

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

LEROY L. YOUNG and
ATTORNEY GENERAL OF OKLAHOMA,

Petitioners,

v.

ERNEST EUGENE HARPER,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

Leroy L. Young and the Attorney General of Oklahoma respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit is reported at 64 F.3d 563 and is reprinted at pages 1a to 15a of the accompanying appendix to this petition ("Pet. App."). The Order of February 13, 1996, denying the Petition for Rehearing and Suggestion for Rehearing *En Banc* has not been reported. It is reprinted at pages 16a to 17a of the appendix. The Order of February 28, 1996, reflecting that five judges would have granted rehearing has not been reported. It is reprinted at pages 18a to 19a of the appendix.

The District Court's Order entered January 10, 1995 has not been reported. It is reprinted at pages 20a to 37a of the appendix. Additionally, the Opinion of the Oklahoma Court of Criminal Appeals is reported at 852 P.2d 164 and is reprinted at pages 38a to 42a of the appendix.

STATEMENT OF JURISDICTION

The Judgment and Opinion of the Court of Appeals was entered on August 30, 1995. Pet. App. at 1a to 15a. The Order denying Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on February 13, 1996. Pet. App. at 16a to 17a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV (Section 1):

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to

any person within its jurisdiction the equal protection of the laws.

STATUTES

Okla. Stat. tit. 57, § 365 (Supp. 1990):

Preparole Conditional Supervision Program

A. Whenever the population of the prison system is certified by the State Board of Corrections as exceeding ninety-five percent (95%) of its capacity, as defined in Section 571 of Title 57 of the Oklahoma Statutes, the Department of Corrections and the Pardon and Parole Board shall implement a Preparole Conditional Supervision Program until such time as the population is reduced to ninety-two and one-half percent (92 1/2%) of capacity, for persons in the custody of the Department of Corrections who meet the following guidelines:

1. Only inmates who are otherwise eligible for parole, pursuant to Sections 332.7 and 332.8 of Title 57 of the Oklahoma Statutes, shall be eligible to participate in this program; and

2. An inmate shall serve at least fifteen percent (15%) of his sentence of incarceration and be within one (1) year of his regularly scheduled parole consideration date or be within one (1) year of his projected release date, prior to being eligible for this program.

B. Upon an inmate becoming eligible for this program it shall be the duty of the Pardon and Parole Board, with or without application being made, to cause an examination to be made of the criminal record of the inmate and to make inquiry into the conduct and the record of said inmate during his confinement in the custody of the Department of Corrections.

C. Upon favorable recommendation by the Pardon and Parole Board, notification shall be made to the Department of Corrections that said inmate has been recommended to be placed in this program.

D. Prior to the placement of an inmate on Preparole Conditional Supervision, the Department shall provide written notification to the sheriff and district attorney of the county in which any person on Preparole Conditional Supervision is to

be placed and to the chief law enforcement officer of any incorporated city or town in which said person is to be placed of the placement of the person on Preparole Conditional Supervision within the county or incorporated city or town. The Department also shall provide written notification of the placement of the person on Preparole Conditional Supervision within the county or incorporated city or town to any victim of the crime for which the inmate was convicted by mailing the notification to the last-known address of the victim, if such information is requested by the victim. The Department of Corrections shall not give the address of the inmate to any victim of the crime for which the inmate was convicted.

E. Should an inmate violate any rule or condition during the period of community supervision, the inmate shall be subject to disciplinary proceedings as established by the Department of Corrections.

F. Any inmate who escapes from this program shall be subject to the provisions of Section 443 of Title 21 of the Oklahoma Statutes.

STATEMENT OF THE CASE

This case presents the Court with an opportunity to provide necessary guidance to many lower courts which must address the issue of whether a program which provides an intermediate punishment for inmates, supervised and regulated by state department of corrections, but which allows the inmate to enter and live in the community, is more similar to parole or a minimum security prison. Such a determination is required to resolve the issue of whether the inmate has a liberty interest in continued participation in such a program. The jurisdiction of the District Court was based on 28 U.S.C. § 2241.

A. Trial Court Proceedings.

In 1992, the Respondent, Ernest Eugene Harper, filed a petition for writ of habeas corpus with the Oklahoma Court of Criminal Appeals alleging that he was improperly removed from the Preparole Conditional Supervision Program (the "Program") without the due process requirements set forth in Morrissey v. Brewer, 408 U.S. 471 (1972). At the same time that the Court of Criminal Appeals was considering the Respondent's petition, another inmate, Matthew W. Barnett, had a similar action pending before the Court. See Barnett v. Moon, 852 P.2d 161 (Okla. Crim. App. 1993).

The primary difference between the two actions, however, was that Mr. Barnett had been removed from the Program for disciplinary reasons.[1] The Respondent, however, was removed from the Program because he had been denied parole by the Governor of the State of Oklahoma. See Harper v. Young, 852 P.2d 164, 165 (Okla. Crim. App. 1993). Pet. App. at 38a to 42a.

The Court of Criminal Appeals held that the Respondent was aware, when placed on the Program, that if denied parole he may be removed from the Program. Thus, the Respondent had suffered no due process violation.[2] Pet. App. at 40a to 41a.

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[1]Mr. Barnett was arrested for public drunk. Barnett, 852 P.2d at 163.

[2]In Barnett, the Court held that due to the disciplinary reason for the removal, Mr. Barnett was entitled to due process set forth in Wolff v. McDonnell, 418 U.S. 539 (1974). Mr. Barnett was not only returned to an institutional facility but also lost good time

B. Proceedings in the District Court.

On October 13, 1993, the Respondent filed a Petition for Writ of Habeas Corpus with the District Court. Again, Respondent alleged that he was denied due process when removed from the Program. The District Court, after discussing whether the Respondent had a liberty interest in remaining on the Program under the Fourteenth Amendment or created by state law, denied the Respondent any relief. Pet. App. 20a to 37a.

The District Court concluded that because this Court had "steadfastly refused to expand the scope of liberty interest," the Respondent did not have a liberty interest in remaining on the Program protected by the

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credits.

Fourteenth Amendment. Pet. App. at 34a to 35a. The District Court also found that the state had not created a liberty interest in remaining on the Program. Pet. App. at 35a to 37a.

C. Proceedings in the Court of Appeals.

The Respondent timely appealed from the District Court's Order denying his petition for writ of habeas corpus. The Court of Appeals reversed the decision of the District Court. Pet. App. at 1a to 15a.

The Court of Appeals held that placement on the Program furnishes an inmate with a liberty interest in continued participation protected by the Fourteenth Amendment. The Court of Appeals held, in accordance with the Eighth Circuit Court of Appeals in Edwards v. Lockhart, 908 F.2d 299 (8th Cir. 1990), that when a

program releases an inmate into society on a full-time basis, the program more closely resembles parole or probation than any other form of institutional confinement. Pet. App. at 12a. Thus, the Court of Appeals held that the Respondent was entitled to the procedural safeguards provided in Morrissey v. Brewer. Pet. App. at 12a.

Petitioner filed a petition for rehearing and suggestion for rehearing en banc. On February 13, 1996, the Court of Appeals issued its Order denying rehearing and suggestion for rehearing en banc. Pet. App. at 16a to 17a.

On February 28, 1996, the Court of Appeals issued an amendment to its Order denying rehearing,

reflecting that five judges would have granted rehearing. Pet. App. at 18a to 19a.

REASONS FOR GRANTING THE WRIT

The Court's review of this matter is necessary because:

A. The lower Federal courts, which frequently address the issue presented, need this Court's guidance on the issue, particularly since there is a split in the circuits on the issue;

B. The Court of Appeals has decided the issue in a manner which conflicts with the decision of the Court of Criminal Appeals, the state court of last resort; and

C. This issue is an important issue which has not, but should be, decided by this Court.

A. The lower Federal courts, which frequently address the issue presented, need this Court's guidance on the issue, particularly since there is a split in the circuits on the issue.

The Tenth Circuit Court of Appeals, in the opinion below, concluded that, due to the inmate's release from the four walls of incarceration, the Program "more closely resembles parole or probation than even the more permissive forms of institutional confinement." Pet. App. at 12a. Due to such finding, the Tenth Circuit held that the Respondent had a liberty interest derived from the Fourteenth Amendment to remain in the Program. The Tenth Circuit was persuaded by the holding of the Eighth Circuit Court of

Appeals in Edwards v. Lockhart, 908 F.2d 299 (8th Cir. 1990) and joined in that holding.

In sharp contrast to the conclusion reached on this issue by the Eighth and Tenth Circuits, the Second Circuit, in United States v. Taylor, 47 F.3d 508 (2d Cir. 1995), held that the Connecticut Supervised Home Release program, which is strikingly similar to the subject Program, is a type of confinement. Thus, the Second Circuit held that the degree of confinement is more analogous to that of an inmate in a minimum security prison.

The issue in Taylor was whether the inmate was released from confinement when placed on the program. Although the issue in Taylor was not whether the inmate had a liberty interest in remaining on the Connecticut

program, the decision of whether the program was a type of confinement was determinative of the issue raised.

Furthermore, the Second Circuit discussed and agreed with the finding of the Connecticut Supreme Court which held that no liberty interest existed in continued participation in the program. See Asherman v. Meachum, 213 Conn. 38, 566 A.2d 663 (1989). This finding directly conflicts with the finding of the Eighth and Tenth Circuits.

Clearly the lower Federal courts need this Court's guidance on this issue, given that there is a split in the circuit courts. Furthermore, as the Second Circuit noted, many other jurisdictions are experimenting with such intermediate punishments. Accordingly, the issue

will appear before the Federal courts on an increasing frequency. This issue cannot be resolved and applied in a consistent manner without review by this Court.

B. The Court of Appeals has decided the issue in a manner which conflicts with the decision of the Court of Criminal Appeals, the state court of last resort.

As stated above, the Tenth Circuit Court of Appeals, in the opinion below, concluded that, due to the inmate's release from the four walls of incarceration, the Program "more closely resembles parole or probation than even the more permissive forms of institutional confinement." Pet. App. at 12a. The Court of Criminal Appeals for the State of Oklahoma decided in Barnett v. Moon, 852 P.2d 161, 163 (Okla. Crim. App. 1993), that only the degree of the inmate's confinement is affected by his placement in the

Program. The Court of Criminal Appeals based its determination on the statutory provisions that (1) the inmate on the Program remains within the custody of the Oklahoma Department of Corrections and (2) the inmate is subject to the disciplinary proceedings as established by the Department of Corrections should he violate any of the rules or conditions of the Program. Okla. Stat. tit. 57, § 365(A) (1991).

The Court of Criminal Appeals found that the Program was a degree of confinement; whereas, the Tenth Circuit found the Program to be analogous to parole. Such decisions distinctly conflict.[3] The only means for resolution of this conflict is a decision by this Court. Thus, it is imperative that the writ be granted.

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[3]In Barnett, the Oklahoma Court of Criminal Appeals found Edwards v. Lockhart inapplicable. The Tenth Circuit, however, specifically held that they were persuaded by Edwards.

C. This issue is an important issue which has not, but should be, decided by this Court.

The Preparole Conditional Supervision Program is a program which was instituted by the Oklahoma Legislature due to the overcrowding of the prisons within the State of Oklahoma. Pursuant to Title 57, Section 365 of the Oklahoma Statutes, the Program is to be used only when the population of the prison system exceeds ninety-five percent (95%) of its capacity. As noted by the Second Circuit, unfortunately, many other states are implementing similar programs to relieve the continually growing problem of prison overcrowding. Taylor, 47 F.3d at 509. As a result, the issue will more frequently appear before state and federal courts.

Accordingly, it is imperative that a determination be made by this Court as to what process is due an inmate who is placed on such a program before he can be removed from such program. Is the inmate entitled to due process as set forth in Morrissey v. Brewer, 408 U.S. 471 (1972) (revocation of parole) or as set forth in Wolff v. McDonnell, 418 U.S. 539 (1974) (degree or situs of confinement)? Only in very limited circumstances has this Court held that a liberty interest has arisen in favor of an inmate under the Constitution whose original confinement was lawful. See Morrissey v. Brewer, (revocation of parole); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (revocation of probation); Vitek v. Jones, 445 U.S. 480 (1980) (involuntary transfer of inmate to mental hospital). The status of an inmate under the Program is not the same as any of the liberty interests previously recognized by this Court.

The status of an inmate on such a program is not the same as a parolee. The only similar features of the Program and parole are that the inmate is allowed to work outside of the correctional facility and may reside in his own home.

Pursuant to Okla. Stat. tit. 57, § 365 (Supp. 1990), an inmate placed on the Program remains in the custody of the Oklahoma Department of Corrections. An inmate placed on the Program is aware that he can be removed from the program if he (1) becomes ineligible for parole; or (2) fails to satisfactorily attend and make progress in the educational program he is required to attend. In addition, an inmate is aware that if any rule or condition of the Program is violated, the inmate will be subject to the disciplinary proceedings of the Department of Corrections. Thus, the inmate is

clearly aware that while on the Program he remains in the custody and confines of the Department of Corrections.

In addition, the inmate is aware that if he should fail to report as required, he will be considered an escapee and will be subject to the provisions of Okla. Stat. tit. 21, § 443 (1991). Each of these provisions are exclusive to the Program.

As stated in Morrissey, a parolee relies on an implicit promise that parole will be revoked only if he violates a condition of parole. An inmate on the Program does not have such a promise on which to rely because the inmate is aware that he may be removed from the Program merely because he no longer meets the eligibility requirements of continued participation.

Thus, it is clear that an inmate placed on the Program is not the equivalent of a parolee.

As this Court has continually refused to expand the scope of liberty interest, a determination of whether a liberty interest arising from the Constitution will be expanded to such a preparole program is crucial.

A decision concerning what process is due an inmate placed in such a Program, where the inmate does not have the same liberties as a parolee but is also not behind four walls, is an important issue which has not, but should be addressed by the Court. The decision is necessary for uniformity within the jurisdictions and also to allow authorities within the individual states to make informed and knowledgeable decisions concerning

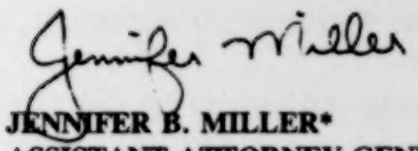
whether the Program is beneficial to their respective state.

CONCLUSION

For the reasons stated above, the Petitioners, Leroy L. Young and the Attorney General for the State of Oklahoma respectfully requests this Court grant its Petition for a Writ of Certiorari.

Respectfully submitted,

W. A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA



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APPENDIX

APPENDIX A

ERNEST EUGENE HARPER,
Petitioner-Appellant,

v.

LEROY L. YOUNG; ATTORNEY GENERAL OF OKLAHOMA,
Respondents - Appellees.

No. 95-5026

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA
(D.C. No. 93-C-948-B)

Submitted on the briefs without oral argument.

Ernest Eugene Harper, Pro Se, Boley, Oklahoma

W.A. Drew Edmondson, Attorney General of Oklahoma, and Jennifer B. Miller, Assistant Attorney General, Oklahoma City, Oklahoma, for Respondents-Appellees.

Before SEYMOUR, Chief Judge, McKAY and HENRY, Circuit Judges.

McKAY, Circuit Judge.

Mr. Ernest Harper, presently an inmate in the Oklahoma prison system, challenges the constitutionality of the process by which he was terminated from the Oklahoma Pre-parole Conditional Supervision Program ("the Program") -- a penal status similar to, although more restrictive than, parole that allows convicts to live and work in society. The parties do not dispute that Mr. Harper received verbal notice of his renewed incarceration somewhat less than five hours before he was to turn himself in to authorities and that he was never granted any sort of hearing at which he could present evidence of any kind. Believing himself to have been deprived of liberty without due process of law, Mr. Harper first exhausted his state remedies, see Harper v. Young, 852 P.2d 164 (Okla. Crim. App. 1993), and then petitioned the district court for a writ of habeas corpus. The district court denied this petition, and Mr. Harper now appeals.

It is well-settled that the Due Process Clause shields from arbitrary or capricious deprivation those facets of a convicted criminal's existence that qualify as "liberty interests." See Morrissey v. Brewer, 408 U.S. 471 (1972); Hewitt v. Helms, 459 U.S. 460 (1983). Certain liberty interests -- of which parole and probation are of greatest salience here -- inhere in the Due Process Clause and are not subject to deprivation without adherence to the strict procedural safeguards of Morrissey. See, e.g., Morrissey, 408 U.S. 471; Gagnon v. Scarpelli, 411 U.S. 778 (1973). More commonly, the liberty interests possessed by those living in prison are created, if at all, by state law. See Sandin v. Conner, No. 93-1911, __ U.S. __, 1995 WL 360217, at * 3-5 (June 19, 1995) (recounting development of caselaw). In Sandlin, the Supreme Court markedly narrowed the ranges of circumstances that will give rise to state-created liberty interest. See id., at * 6 (holding that state-created liberty interests "will generally be limited to freedom from restraint which . . . imposes atypical and significant hardship on the inmate in

relation to the ordinary incidents of prison life").[1] The Oklahoma Court of Criminal Appeals has, apparently, held under pre-Sandin standards that the state had created a liberty interest in program participation. See Barnett v. Moon, 852 P.2d 161, 162-63 (Okla. Crim. App. 1993).[2] The extent to which that conclusion survives Sandin is a question of no small difficulty.[3]

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[1] **Sandin does not purport to alter the law as it pertains to those liberty interests that inhere in the Due Process Clause itself. See Sandin, 1995 WL 360217, at * 6; See also id., at * 6-7 (opining that prior standards had led courts to interfere in day-to-day management of incarcerated prisoners).**

[2] **The Oklahoma Court of Criminal Appeals did not explicitly hold in Barnett that a state-created liberty interest existed. That court, however, did indicate that removal from the Program for disciplinary reasons should be subject to the procedural protections outlined in Wolff v. McDonnell, 418 U.S. 539 (1974) -- a result which rather strongly suggests that the Oklahoma court found a state-created liberty interest in continued participation in the Program.**

[3] **A state could, presumably, choose to impose procedural standards upon itself that are more stringent that those mandated by the Constitution. It was, of course, unnecessary for the Oklahoma Court of Criminal Appeals to draw such a distinction in Barnett.**

We need not address it today, however, because we hold that program participation is sufficiently similar to parole or probation to merit protection by the Due Process Clause itself.

Established by statute, see Okla. Stat. Ann. tit. 57, § 365 (West 1995), the Program releases qualified inmates into society on a conditional basis. Program participants are chosen by the Pardon and Parole Board. Statutory criteria limit selection to those inmates who are eligible for parole, have served fifteen percent of the relevant sentence, and are within one year of a parole docket date. Id. § 365(A).[4] Although remaining in the "constructive custody" of the Department of Corrections, those in the Program work and reside beyond the confines of a state penal institution and are

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[4] **Additional requirements have been set by Department of Corrections regulation. To qualify for consideration, an inmate must have a verified home offer; must pursue an educational program or otherwise be employed; must have no serious prison misconduct; must be medically cleared; and must have no detainers for prosecution. The state does not contend that Mr. Harper failed to meet any of these conditions.**

thus free to enjoy most of the benefits of a normal existence. In return, a program participant must agree to abide by restrictions similar to those placed upon a parolee.[5] Violation of a condition may result in termination from the Program and a return to incarceration. An otherwise eligible participant who has been denied parole may also be removed from the Program after a ninety-day review period. Okla. Pardon & Parole Bd. Proc. 4-11 (effective Aug. 8, 1991).[6]

The State does not here contend either that Mr. Harper was terminated from the Program because of ineligibility or that it possessed peremptory authority to

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[5] He or she may be searched or visited at any time by a law enforcement officer; must report to an assigned probation officer at frequent intervals; cannot travel freely and may be subject to a curfew; cannot use drugs or alcohol or visit locations where those substances are likely to be present; may be urine-tested at any time; must remain employed or pursue a full-time educational program; must pay monthly fees to the Department of Corrections; and may not assume debt or apply for public assistance without permission. The state admits that Mr. Harper violated none of these prohibitions.

[6] We note that Procedure 4-11 became effective some five months after Mr. Harper was returned to prison.

remove him from the Program. The record, in any event, would support neither contention. Although Mr. Harper was in fact removed from the Program because he was denied parole, nothing in the regulations governing the Program mandated that result. The statute, in relevant part, requires only that an applicant be within one year of parole consideration -- a condition that Mr. Harper has met at all times since his termination. Procedure 4-11, moreover, states that convicts can remain in the program after the denial of parole. The regulations likewise contain no language suggesting that participants may be terminated "at will" upon the denial of parole. Procedure 4-11 indicates the truth of the converse: convicts have both the right to remain with the Program for ninety days after parole denial and the opportunity to be considered for continued placement with the Program. Having determined that Mr. Harper was in fact qualified to remain with the Program, we turn to the question of what procedures should have accompanied his termination from the Program.

The State contends that, similarities to parole notwithstanding, placement in the Program does not effect release from the custody of the Department of Corrections and is, therefore, merely a change in the degree or situs of an inmate's confinement. As such, the State concludes, program participation cannot be equated to parole or probation, and revocation of such participation does not warrant the extensive procedural protections mandated by Morrissey. The Oklahoma Court of Criminal Appeals, adopting the reasoning advocated by the State, has held that participation in the Program is not a liberty interest inherent in the Due Process Clause itself. See Barnett v. Moon, 852 P.2d 161, 162-63 (Okla. Crim. App. 1993).

The identification of the liberty interests that are protected by the Due Process Clause is a question of federal constitutional law that we review *de novo*. See Memphis Light, Gas, & Water Div. v. Craft, 436 U.S. 1, 9 (1978). Thus, while we respect the Court of Criminal Appeals' analysis of the constitutional implications of the Program, we are not bound by it. We are instead persuaded by the contrary holding of

Edwards v. Lockhart, 908 F.2d 299 (8th Cir. 1990). In Edwards, the Eighth Circuit analyzed a program that "released [a prisoner] from confinement and allowed [her or him] to live and pursue studies or work outside corrections facilities under the close supervision of a parole officer." Id. at 300. The program considered in Edwards, like that at issue here, required participants to have a home sponsor, maintain employment or pursue an education, refrain from drugs and alcohol, obtain approval before leaving their county of residence, and obey all applicable Department of Corrections regulations. Id. at 301. Although recognizing that a participant's existence was somewhat less free than that of a parolee, the Edwards court nonetheless held that the similarities were sufficiently strong to warrant the process required by Morrissey:

> Viewing parole and work release on a continuum, with more freedom and self-determination associated with parole and less with work release, we believe that Edwards' participation in this program is more closely related to parole. Certainly Edwards is subject to more constraints in the [] program than she would be if on

> parole, but we find determinative the fact that she has been released from institutional life into society. The constraints applied to Edwards serve to guide her in the outside world, not . . . to confine her to the equivalent of an institutional life.

Id. at 302-03 (citations omitted).

"A liberty interest inherent in the Constitution arises when a prisoner has acquired a substantial, although conditional, freedom such that 'the loss of liberty entailed [by its revocation] is a serious deprivation requiring that the [prisoner] be accorded due process.'" Whitehorn v. Harrelson, 758 F.2d 1416, 1420 (11th Cir. 1985) (quoting Gagnon, 411 U.S. at 781)). Edwards, we think, correctly identifies the dispositive characteristic that marks the point at which the Due Process Clause itself implies a liberty interest: it is the fact of release from incarceration. The liberty associated with a life outside the walls of a penal facility dwarfs that available to an inmate. It is the freedom to "be gainfully employed," "to be with family and friends," and "to form the other enduring attachments of normal life." Morrissey, 408 U.S. at 482. It is the

ability to reside in a home of one's own, without bars or fences or bonds, beyond the immediate authority of guards or wardens. The passage outside the walls of a prison does not simply alter the degree of confinement; rather, it works a fundamental change in the kind of confinement, a transformation that signals the existence of an inherent liberty interest and necessitates the full panoply of procedural protections outlined in Morrissey. See, e.g., id., at 481-84; see also, Brennan v. Cunningham, 813 F.2d 1, 5-6 (1st Cir. 1987) ("[T]he Court has found independent constitutional liberty interests where total release from institutional life has been revoked."); Whitehorn, 758 F.2d at 1420-21 (same); cf. Hewitt v. Helms, 459 U.S. 460, 467-68 1983) (analyzing transfer of inmates into administrative segregations and emphasizing difficulties of prison management and limited rights of incarcerated convicts); Wolfe, 418 U.S. at 561-63 (recognizing difficulties of implementing Morrissey procedures in prison environment).

We are therefore in accord with the Eighth Circuit in concluding that a prisoner release program

which permits a convict to exist, albeit conditionally, in society on a full-time basis more closely resembles parole or probation than even the more permissive forms of institutional confinement. See Edwards, 908 F.2d at 302-03; see also, United States v. Stephenson, 928 F.2d 728, 732 (6th Cir. 1991) (finding inherent liberty interest in continued placement in supervised release program that allowed convicts to live in society); cf. Brennan, 813 F.2d at 5-6 (finding no inherent liberty interest in continued placement with institutional halfway house); Whitehorn, 758 F.2d at 1420-21 (finding no inherent liberty interest in continued participation in work release program that confined convicts to institutional community center). There is no question but that those in the Program enjoy the benefits and joys of gainful employment, the company of family and friends, and the pursuits of humdrum existence. Finding no material distinction between the program addressed in Edwards and that presented here, we adopt the sound reasoning of our fellow circuit. Due process therefore mandates that program participants receive at least the procedural protections described in Morrissey:

> (a) written notice of the claimed violations . . .; (b) disclosure . . . of [the] evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers of lawyers; (f) a written statement by the factfinders as to the evidence relied on and the reasons for [revocation].

Morrissey, 408 U.S. at 489.

The record conclusively demonstrates that the process afforded Mr. Harper fell far short of the Morrissey standard. On March 14, 1991, at 5:30 a.m., Mr. Harper received a telephone call from his parole officer informing him that he had been removed from the program because he had failed to win parole. Mr. Harper was given until 10:00 a.m. to report to the Program office and was returned to prison later that same day. He subsequently was mailed a four-word explanation of the reasons for his removal from the Program. He received no subsequent hearing or other

opportunity to respond to the Parole Board's decision to remove him from the Program. Mr. Harper therefore received no prior written notice of revocation; no opportunity to offer evidence, rebut arguments made against him, or argue on his own behalf; and no meaningful explanation of the reasons for his termination from the program. In sum, the record supports the conclusion that Mr. Harper received almost no process at all before he was deprived of his liberty.[7]

We therefore reverse the decision of the district court and remand with instructions to issue the writ of habeas corpus unless Mr. Harper is reinstated to the Program by the State of Oklahoma. After reinstatement, any attempt to remove Mr. Harper from the Program

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[7] The Oklahoma Court of Criminal Appeals also concluded that Program Procedure 4-11 gives inmates adequate prior notice that they can be returned to prison if parole is not granted. See Harper, 852 P.2d at 165. However, we note that Procedure 4-11 was promulgated on August 8, 1991, some five months after Mr. Harper's termination from the program. In addition, Mr. Harper received none of the other procedural safeguards required by Morrissey and was not even afforded the less comprehensive process deemed necessary by the Court of Criminal Appeals in the companion case of Barnett v. Moon, see Barnett, 852 P.2d at 163.

must, of course, comply with the procedures mandated by this opinion.

REVERSED AND REMANDED.

APPENDIX B

ERNEST EUGENE HARPER,
Petitioner-Appellant,

v.

LEROY L. YOUNG; ATTORNEY GENERAL OF OKLAHOMA,
Respondents - Appellees.

No. 95-5026

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ORDER
Entered February 13, 1996

Before SEYMOUR, McKAY, PORFILIO, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, HENRY, BRISCOE, LUCERO, MURPHY, Circuit Judges.

This matter comes on for consideration of Appellees' Petition for Rehearing and suggestion for rehearing *en banc*.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing *en banc* was transmitted to all of the Judges of the Court who are in regular active service, and a poll was taken.

The Court having been polled on the suggestion for rehearing *en banc*, Rule 35, Federal Rules of Appellate Procedure, **rehearing *en banc* is denied.**

Entered for the Court

PATRICK FISHER, Clerk

By: Opal A. Carter, Deputy Clerk

APPENDIX C

ERNEST EUGENE HARPER,
Petitioner-Appellant,

v.

LEROY L. YOUNG; ATTORNEY GENERAL OF OKLAHOMA,
Respondents - Appellees.

No. 95-5026

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ORDER
Entered February 28, 1996

Before SEYMOUR, Chief Judge, McKAY, PORFILIO, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, HENRY, BRISCOE, LUCERO, MURPHY, Circuit Judges.

The Court, in order to correct a clerical error in the issuance of the order dated February 13, 1996, hereby reissues it in order to reflect that Judges

Anderson, Tacha, Baldock, Brorby and Kelly would grant rehearing.

The order is reissued *nunc pro tunc* and is to be read as follows:

This matter comes on for consideration of Appellee's Petition for Rehearing and suggestion for rehearing *en banc*.

Upon consideration whereof, the Petition for Rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing *en banc* was transmitted to all of the judges of the Court who are in regular active service, and a poll was taken.

The Court having been polled on the suggestion for rehearing *en banc*, Rule 35, Federal Rules of Appellate Procedure, rehearing *en banc* is denied.

Judges Anderson, Tacha, Baldock, Brorby and Kelly would grant rehearing.

Entered for the Court
PATRICK FISHER, Clerk
By: Elisabeth A. Shumaker, Chief Deputy Clerk

APPENDIX D

ERNEST EUGENE HARPER,
Petitioner,

v.

LEROY L. YOUNG, et al.,

Respondents

No. 93-C-948-B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ORDER
Entered January 10, 1995

ORDER

In the present pro-se Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, Petitioner contends that his due process rights were violated when he was removed from the preparole-conditional-supervision program and transferred back to prison without a hearing. Respondent contends that habeas

corpus is not the proper procedure for Petitioner's claims. In the alternative, he argues that Petitioner was provided all the process that was due him. For the reasons stated below, the Court concludes that the Petition for a Writ of Habeas Corpus must be denied.

1. BACKGROUND

Following his conviction for first degree murder in the District Court of Tulsa County, Case No. CRF-75-2445, on April 7, 1976, Petitioner was sentenced to life imprisonment. On October 16, 1990, the Oklahoma Department of Corrections (DOC) placed Petitioner under the provisions of the Preparole Conditional Supervision Program (PPCS), Okla. Stat. tit. 57, § 365 (1990). Under that program, Petitioner was allowed to live outside of the institution, hold a job, and be with his family and friends, although he remained under the close supervision of his preparole officer. On March 14, 1991, Petitioner's PPCS status was revoked without a hearing and Petitioner was returned to the custody of the DOC. The only process given Petitioner was notification that the Governor had refused to grant him parole and that he would be reincarcerated.

In March, 1992, Petitioner filed a Petition for a Writ of Habeas Corpus in the District Court for Okfuskee County, alleging that his PPCS status was improperly revoked without a hearing. He argued that he had a liberty interest in remaining on PPCS sufficient to require due process prior to revocation. The district court denied relief, finding that habeas corpus was not the proper procedure to challenge the revocation of his PPCS status. On appeal, the Court of Criminal Appeals rejected the district court's conclusion that a Writ of Habeas Corpus was not appropriate, but concluded that Petitioner was not denied due process when he was removed from PPCS without a hearing. The Court of Criminal Appeals concluded that Pardon and Parole Board Procedure No. 004-11, effective August 8, 1991, gave Petitioner "sufficient notice when he [was] placed in the program that he may be removed from it when the Governor exercises his discretion and declines to grant parole." Harper v. Young, 852 P.2d 164, 165 (Okla. Crim. App. 1993). Procedure No. 004-11 provides that inmates who are denied parole by the governor shall remain on PPCS, but their cases shall be

reviewed by the Parole Board ninety days from denial to determine whether that status will be continued.[1]

In the present petition, Petitioner argues that Procedure No. 004-11, effective five months after the revocation of his PPCS status, was inadequate notice in his case. He also argues that the "application of said policy to Petitioner is a retroactive law as applied to him and as such is violative of his constitutional rights as *ex post facto* law."

Respondent asserts that habeas corpus is not the proper procedure for Petitioner's claim. He argues that the claim for reinstatement challenges the conditions of confinement and not the fact or length of confinement, and therefore the petition should be dismissed. In the alternative, Respondent argues that Petitioner was not denied due process when he was removed from the PPCS program without a hearing because he remained in the custody of the DOC while being on PPCS. Respondent argues that the PPCS program merely

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[1]Petitioner was not granted a ninety-day review by the Parole Board under Procedure No. 004-11 because he was re-incarcerated prior to the enactment of that Procedure.

changes the degree and the situs of an inmate's confinement, citing Barnett v. Moon, 852 P.2d 161, 163 (Okla. Crim. App. 1993).

II. DISCUSSION

As a preliminary matter, the Court must determine whether Petitioner meets the exhaustion requirements of 28 U.S.C. § 2254(b) and (c). See Rose v. Lundy, 455 U.S. 509 (1982). Exhaustion of a federal claim may be accomplished by either (a) showing the state's appellate court had an opportunity to rule on the same claim presented in federal court, or (b) that at the time he filed his federal petition, he had no available means for pursuing a review of his conviction in state court. White v. Meachum, 838 F.2d 1137, 1138 (10th Cir. 1988); see also, Wallace v. Duckworth, 778 F.2d 1215, 1219 (7th Cir. 1985); Davis v. Wyrick, 766 F.2d 1197, 1204 (8th Cir. 1985), cert. denied, 475 U.S. 1020 (1986). Respondent concedes, and this Court finds, that the Petitioner meets the exhaustion requirements under the law. The Court also finds that an evidentiary hearing is not necessary as the issues can be resolved on the basis of the record. See Townsend

v. Sain, 372 U.S. 293, 318 (1963), overruled in part by Keeney v. Tamayo-Reyes, 112 S.Ct. 1715 (1992).

Next the Court turns to the substantive issues in this case: (1) whether Petitioner properly brought this action under the federal habeas corpus statute, and (2) whether Petitioner had a liberty interest in remaining on the PPCS program.

A. Appropriateness of this Habeas Corpus Action

As noted above, Respondent challenges the appropriateness of maintaining this action under the federal habeas corpus statute. He argues that the claim for reinstatement challenges the conditions of confinement and not the fact or length of confinement. Citing Preisser v. Rodriquez, 411 U.S. 475 (1973), Respondent contends that the proper vehicle for such a challenge is the civil rights statute. The Court disagrees.

In Preiser, 411 U.S. at 499-500, the U.S. Supreme Court "explicitly left open the possibility that a challenge to prison conditions, cognizable under § 1983, might also be brought as a habeas corpus claim." Brennan v. Cunningham, 813 F.2d 1, 4 (1st Cir. 1987).

Moreover, the nature of the PPCS program shows that it is more closely related to the length, rather than simply the conditions of confinement. Therefore, the Court concludes that the revocation of PPCS may be properly challenged in a habeas corpus proceeding. See Brennan, 813 F.2d at 4-5.

B. Liberty Interest

The main issue in this case is whether Petitioner had a liberty interest, implicating due process protections, in remaining on the PPCS program. Such an interest may arise either under the Fourteenth Amendment or under state law.

1. Fourteenth Amendment

The Supreme Court has consistently held that prisoners under confinement do not have a liberty interest deriving independently from the Constitution, even in cases concerning parole and good time credits. See Hewitt v. Helms, 459 U.S. 460 (1983); Wolfe v. McDonnel, 418 U.S. 1 (1979). The Court has found, however, independent liberty interests where total release from institutional life has been revoked, as in the case of a parolee, or where the restrictions imposed go

beyond the original conditions of confinement. See Morrissey v. Brewer, 408 U.S. 471 (1972) (independent constitutional due process protection in case of revocation of parole); Vitek v. Jones, 445 U.S. 480 (1980) (independent due process protection in involuntary transfer to mental hospital); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (independent constitutional due process protection in case of revocation of probation). "A liberty interest inherent in the Constitution arises when a prisoner has acquired a substantial although conditional freedom such that 'the loss of liberty entailed [by its revocation] is a serious deprivation requiring that the [prisoner] be accorded due process.'" Whitehore v. Harrelson, 758 F.2d 1416, 1420 (11th Cir. 1985) (footnote omitted) (quoting Gagnon, 411 U.S. at 781).

An inmate on PPCS is granted a measure of liberty that lies between that of a parolee and that of an inmate incarcerated in prison. A prisoner on PPCS enjoys considerable liberty similar to a parolee. He lives outside an institution and is free to work and be with his family and friends, while remaining under the

close supervision of his preparole officer. Unlike a parolee, however, a prisoner on PPCS has not yet "been released from prison based on an evaluation that he shows reasonable promise of being able to return to society and function as a responsible, self-reliant person." Morrissey, 408 U.S. at 482. He is instead permitted to live in the world outside the prison walls, although still in "custody" of the DOC, prior to the granting of parole as an alternative to incarceration due to overcrowding in the prison system.

Okla. Stat. Ann tit. 57, § 365(A) (emphasis added) states as follows:

> Whenever the population of the prison system is certified by the State Board of Corrections as exceeding ninety-five percent (95%) of its capacity . . . the Department of Corrections and the Pardon and Parole Board shall implement a Preparole Conditional Supervision Program until such time as the population is reduced to ninety-two and one-half percent (92 1/2%) of capacity, for persons in the custody of the department of Corrections who meet the following guidelines:

> (1) Only inmates who are otherwise eligible for parole, pursuant to Sections 332.7 and 332.8 of this title, shall be eligible to participate in this program;
>
> (2) An inmate shall serve at least fifteen percent (15%) of his sentence of incarceration and be within one (1) year of his regularly scheduled parole consideration date or be within twenty-one (21) months of his projected release date, prior to being eligible for this program; and
>
> (3) Only inmates who have attained the proficiency level established by Section 3 of this act . . . or who comply with education requirements as provided in subsection C of Section 4 of this act shall be eligible for participation in this program.

Pursuant to Section 365, an inmate on PPCS cannot be equated to an inmate who has been granted parole -- i.e., conditional release intended to permit the prisoner to demonstrate that he can function in society.[2]

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[2]Nor can an inmate on PPCS be equated to a prisoner who returns to an institutional setting at night after working or studying outside the prison walls. Cf. DeTomaso v. McGinnis, 970 F.2d 211 (7th Cir. 1992); O'Bar v. Pinion, 953 F.2d 74 (4th Cir. 1991); Codd v. Brown, 949 F.2d 879 (6th Cir. 1991); Brennan v. Cunningham, 813 F.2d 1 (1st Cir. 1987);

In fact, an inmate on the PPCS program, unlike an inmate on parole, is required to remain eligible for parole in order to participate in the program. See Section 365(A)(1). He is subject to the DOC's disciplinary proceedings should he violate any of the rules of the PPCS program. See, Section 365(E). He is deemed in constructive custody of the DOC for purposes of Escape from Custody of the Department of Corrections, Okla. Stat. tit. 21, § 443 (West Supp. 1995), should he not be located within twenty four hours or if he fails to report to a correctional facility or institution, as directed. See Section 365(F). Lastly, an inmate on PPCS is required to attend and progress satisfactorily in an educational program.

In Barnett v. Moon, 852 P.2d 161, 163 (Okla. Crim. App. 1993), the Court of Criminal Appeals

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Whitehorn v. Harrelson, 758 F.2d 1416 (11th Cir. 1985); see also, Beasley v. Duncil, 792 F.2d 485 (S.D.W.Va 1992), affirmed, 9 F.3d 1106 (4th Cir. 1993). In the above cases, the courts concluded that prisoners did not possess an independent liberty interest arising under the fourteenth Amendment in remaining in a work/study release program or halfway house because their situation was different from that of a parolee.

concluded that because an inmate on PPCS remains in the custody of the DOC he is not entitled to the protections set out in Morrissey v. Brewer, 408 U.S. 471 (1972). The court stated as follows:

> By definition, Preparole is not the same as parole. The prefix "pre" means "in front," "before," or "in advance." XII Oxford English Dictionary, at 294 (2d ed. 1989). Here, it implies a preparatory or preliminary status present before the sought-after status is manifested. therefore, preparole is by definition not parole, but a preparatory status to parole itself. And since "parole" means release form [sic] jail, prison or other confinement after actually serving part of a sentence, [Black's Law Dictionary at 1116 (6th ed. 1990], logically preparole means before such release.
>
> . . .
>
> Under this program (the PPCS Program), a person in the custody of the Department of Corrections is placed in a specific city or town after proper notification of authorities there (Section 365(D)). An inmate on PPCS remains in the custody of the Department of Corrections. See 57 O.S.1991, § 365(A). Thus, only the

> degree of his confinement is affected by his placement on the PPCS Program.

Barnett, 852 P.2d at 162-63.

In Pece v. Neuman, et al., Case No. CIV-90-44-T (W.D.Okla. Aug. 28, 1990) (unpublished opinion, attached to Respondent's Rule 5 response), the Western District of Oklahoma held that probation/parole protections of Morrissey v. Brewer do not apply to an inmate removed from PPCS status as a result of a program violation because the statute itself provides that any violation of rule or condition would subject an inmate to the disciplinary proceedings established by the Department of Corrections. Similarly in Gloria v. Miller, 658 F.Supp. 229, 232 (W.D.Okla. 1987), the Western District held that Oklahoma's house arrest program was not probation or parole and that inmates in the house arrest program, as well as the PPCS program, remain in the custody of the DOC. See 57 O.S.1991, § 510.2.[3]

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[3]**In Oklahoma, the house arrest program, much like the PPCS program, authorizes prisoner to be in a community away from a correctional facility for the purpose of reintegration of the person into society.**

Petitioner asks this Court to reject the reasoning of the Oklahoma Court of Criminal Appeals in Barnett and to adopt the Eight Circuit's analysis in Edwards v. Lockhart, 908 F.2d 299 (8th Cir. 1990), because his status on PPCS was more like that of a parolee than an inmate in the custody of the DOC in that he lived outside an institution, was free to work and interact with family and friends. The Court declines to apply Edwards to the case at hand. Edwards involved an inmate who had been released from institutional life completely pursuant to a work/study release program which equated for all purposes to parole. The Eighth Circuit there held that the prisoner had a liberty interest in remaining on the work release program sufficient to require due process prior to revocation because she was allowed to live in the world outside prison walls just like a parolee. The court noted that while "Edwards is subject to more constraints in the 814 program than she would be if on parole, . . . we find determinative the fact that she has been released from institutional life into

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society. The constraints applied to Edwards serve to guide her in the outside world, not . . . to confine her to the equivalent of an institutional life." Id., at 302-03.

Because the Petitioner in the case at hand had not been released from institutional life altogether while participating on the PPCS Program, he did not have a liberty interest protected by the Fourteenth Amendment in retaining his PPCS status. As noted above, the Supreme Court has inferred inherent due process protections only in cases in which the prisoner's "release from institutional life altogether" has been revoked, Hewitt v. Helms, 459 U.S. at 468; Morrissey v. Brewer, 408 U.S. 471 and Gagnon v. Scarpelli, 411 U.S. at 778; or in cases in which the restrictions imposed go beyond the original conditions of confinement, see Vitek v. Jones, 445 U.S. 480.[4] Although Petitioner was permitted to live outside an institution, work and interact with family and friends,

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[4]The benefit of PPCS as a statutory aid to relieve prison overcrowding would be lost if the DOC were required to provide due process protection as set out in Morrissey v. Brewer every time a prison's PPCS status is revoked.

his release from institutional life was conditioned on obtaining parole. Moreover, Petitioner's return to the general prison population did not subject him to confinement beyond the sentence initially imposed upon him. See Vitek, 445 U.S. at 480. Therefore, because the Supreme Court has steadfastly refused to expand the scope of liberty interest, the Court finds it compelling to conclude that Petitioner did not have a liberty interest protected by the Fourteenth Amendment in remaining on the PPCS program once the governor exercised his discretion to deny Petitioner's parole.

2. State Created Liberty Interest

The Court turns next to state statutes and regulations to determine if there is a liberty interest derived from state law. To establish a liberty interest deriving from state law, a prisoner must show

> "that particularized standards or criteria guide the State's decision makers." If the decision maker is "not required to base its decisions on objective and defined criteria," but instead "can deny the requested relief for any constitutionally permissible reason or for no reason at

> all,". . . the State has not created a constitutionally protected liberty interest.

Olim v. Wakinekona, 461 U.S. 238, 249 (1983) (cites omitted).

After reviewing the DOC procedures in effect at the time Petitioner was re-incarcerated, the Court concludes that the procedures do not contain any mandatory language or specific directives that if the inmate meets the criteria, he shall be placed in the pre-parole conditional supervision program. The procedures merely list the eligibility and placement criteria to be considered and do not contain mandatory language that Petitioner shall remain in the program even if he is not eligible for parole. Only after Petitioner's return to confinement the DOC amended the regulations to provide that inmates who are denied parole by the governor shall remain on PPCS, but their cases shall be reviewed by the Parole Board ninety (90) days from denial to determine whether that status will be continued.

Because neither the statute nor the regulation in question at the time of the revocation of the Petitioner's

PPCS status created a liberty interest, Petitioner was not entitled to due process protection as set out in Morrissey v. Brewer.

III. CONCLUSION

After carefully reviewing the record in this case, the Court concludes that Petitioner did not have a liberty interest under either the Fourteenth Amendment or State law in remaining on the PPCS program. Only the degree of his confinement was affected by his transfer from the PPCS program to an institution within the Oklahoma Department of Corrections. Accordingly, Petitioner was not entitled to the protections of Morrissey v. Brewer, 408 U.S. 471 (1972), when he was removed from the PPCS program.

The Petition for a writ of habeas corpus is hereby **denied**.

SO ORDERED THIS 9TH DAY OF JANUARY, 1995.

THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

APPENDIX E

ERNEST EUGENE HARPER, Petitioner

v.

LEROY YOUNG, Warden, Respondent

No. H 92-735.

COURT OF CRIMINAL APPEALS OF OKLAHOMA

April 15, 1993.

Order Published and Corrected May 11, 1993

ORDER DENYING APPLICATION FOR WRIT OF HABEAS CORPUS

Petitioner Ernest Eugene Harper filed an application in this Court for a writ of habeas corpus, alleging the Department of Corrections (DOC) released him from custody under the provisions of the Preparole Conditional Supervision Program (PPCS), pursuant to 57 O.S.1991, § 365; that he violated no rules or conditions of the PPCS; but was nonetheless removed from the program without due process requirements set

forth in Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

The District Court of Okfuskee County, Case No. C-92-44, denied Petitioner's application for a writ of habeas corpus on May 19, 1992, finding habeas corpus is not the proper procedure to challenge revocation of PPCS status. We disagree. An application for a writ of habeas corpus is appropriate when a prisoner contends his confinement is unlawful. See 22 O.S.1991, Ch. 18, App., *Rules of the Court of Criminal Appeals*, Rule 10.6(C). This Court on September 10, 1992, directed the Attorney General of the State of Oklahoma to respond to the application. That response was filed with this Court on November 10, 1992.

In this Court's unpublished order, we indicated the minimum requirements of *Morrissey* must be observed before a person can be removed from the PPCS program for a rule or condition violation. We need not go through a complete discussion of Petitioner's due process complaint, as it is not dispositive of the issue before us and is fully addressed in *Barnett v. Moon*, 852 P.2d 161, 64 OBJ 1281

(Okl.Cr.1993). As set forth in *Barnett*, the question concerning the PPCS program is not whether an inmate is in custody, because he is; but the degree of confinement used in that custody. The degree of confinement is not of concern to this Court, so long as an administrative procedure affords an appropriate method by which the decision to change the degree of confinement can be justified. Beyond that, there is no constitutional Due Process concern, as it ultimately will have no bearing on when the inmate is released. Therefore, the requirements outlined in *Morrissey* need not apply.

Dispositive of the issue in Petitioner's case is the fact he was not granted parole by the Governor of Oklahoma. It is for this, not a disciplinary reason, he was removed from the PPCS program. The State contends Petitioner has suffered no due process violation due to the fact inmates are aware they will only remain on PPCS status so long as they remain otherwise eligible for parole, and are given notice of the factors which will be considered and what is necessary to remain in the program.

In support of its position, the State attached a copy of Pardon and Parole Board Procedure No. 004-11, effective August 8, 1991, entitled "Pre-Parole Conditional Supervision (PPCS)." Under that procedure, inmates who are denied parole by the governor shall remain on PPCS, but their cases shall be reviewed by the Parole Board ninety days from denial to determine whether that status will be continued.

We believe such a procedure gives an inmate sufficient notice when he is placed in the program that he may be removed from it when the governor exercises his discretion and declines to grant parole. The governor's refusal to grant parole does not change the fact that petitioner is confined and the provisions of *Morrissey* do not apply. The procedures used by the Pardon and Parole Board in determining whether Petitioner should stay in the PPCS program assure Petitioner he is receiving the process that is due him.

Accordingly, Petitioner's application for a writ of habeas corpus is hereby **DENIED**.

IT IS SO ORDERED.

/s/ GARY L. LUMPKIN, Presiding Judge

/s/ **CHARLES A. JOHNSON, Vice Presiding Judge**

/s/ **JAMES F. LANE, Judge**

/s/ **CHARLES S. CHAPEL, Judge**

APPENDIX F

DEPARTMENT OF CORRECTIONS' MANUAL

Okla. Stat. tit. 57, § 365 (Supp. 1988)

OFFENDER MANAGEMENT AND SERVICES MANUAL - PROGRAMS - OUT-COUNT PROCEDURES

Effective Date 7/04/90 OP-090104 Pages 10-14

III. Pre-Parole Conditional Supervision Placement (PPCS) Procedures

Any inmate recommended for pre-parole conditional supervision by the Pardon and Parole Board shall meet the following guidelines for placement to this status. The coordinator of Out Count Placement shall ensure appropriate placement and transfer of inmates to PPCS.

A. Eligibility Criteria for the Pre-Parole Conditional Supervision Program

1. All violent and nonviolent crimes are eligible as long as the offender has served 15 percent of the current sentence and is within one year of a parole docket date. All offenses and offenders are included with the following exceptions:

a. Inmates serving death sentences

b. Inmates serving life without parole

c. Inmates on house arrest

d. Inmates with consecutive sentences or valid detainers

e. Commutation eligible inmates

f. Inmates serving a parole violation

g. Inmates who have escaped while serving the current sentence(s)

B. Pre-Parole Conditional Supervision Application Packets

1. Upon notification by the Pardon and Parole Board that an inmate has been recommended for pre-parole conditional supervision, the facility head shall ensure that a PPCS application packet is submitted within four working days to the population office at LARC.

This packet shall include:

a. "Program Referral Form/Residential Information" (DOC Form 090048)

b. "Facility Assignment Form" (DOC Form 062040

c. "Current Medical Screen" (DOC Form 161060)

d. "CRC" (DOC Form 063002) (front and back)

e. "PPCS Rules and Conditions" (signed and witnessed)

2. Those inmates that meet placement criteria but do not appear to be appropriate candidates for release by the out count placement coordinator shall be referred for administrative review. An administrative review committee comprised of representatives of both the Department of Corrections and the Pardon and Parole Board shall meet to resolve any pending placement decisions. If an inmate is denied placement to the PPCS program by the administrative review committee, the PPCS "Administrative Review Report" shall be completed and signed, attached to the application packet, and returned to the facility. The original shall be placed in Section 5 of the offender field file.

3. The case manager supervisor/unit manager at each affected facility shall advise the inmate(s) of the denial upon receipt of the denied packet.

4. A copy of the administrative review form shall be forwarded to the population office and the Pardon and Parole Board.

5. Offenders who have no home offers in Oklahoma shall have PPCS packets submitted to the out-count office at Lexington. Included in the packet shall be a "Housing Referral" (DOC Form 090051) indicating in which part of the state the offender wants to live. Upon receipt of these packets, the out count administrative office shall forward the "Housing Referral" form to the appropriate reintegration specialist who shall attempt to secure suitable transitional housing for the offender. If no acceptable housing is obtained within 60 days, the reintegration specialist shall notify the administrative officer in the out count office. The packet shall then be denied and returned to the facility. The case manager/unit manager shall inform the offender upon receipt of the packet.

6. Offenders who refuse to sign the appropriate forms for PPCS placement shall have packets submitted to the population office. The FAF and "Reclassification Security Assessment" shall indicate the reason for the offender's refusal to sign the forms. This information shall be forwarded to the

Pardon and Parole Board in the monthly report.

C. Placement Criteria

The administrative officer in the population office shall consider the following criteria when making placement decisions to PPCS:

1. Each inmate considered for placement to PPCS must:

   a. Have a verified home offer.

   b. Be medically cleared.

   c. Have no serious misconducts during the placement period to PPCS. (Facility must ensure population office is notified of any "Offense Reports" during that time period).

   d. Be employed or deemed employable. Any inmate unemployed or not involved in an approved activity (going to school, community service, etc.) in excess of 30 days shall normally be removed from PPCS.

e. Have no detainers for prosecution.

2. Knowledge of aggravating circumstances may be considered in placement decisions.

3. Upon receipt of the application packet, the population office shall submit a residential verification list to the probation and parole districts.

4. It shall be the responsibility of the Division of Probation and Parole to verify the proposed home offer and notify the population office by computer message within five working days of receiving the residential verification list as to the suitability of the proposed home offer. Verification of transitional home placements are to be made by the Reintegration Unit.

5. Any inmate enrolled in a vo-tech program, participating in Lifesteps, or on a waiting list for, or participating in, TADD or CAP shall complete the program before transferring to PPCS.

6. The administrative officer in the population office shall approve placements, schedule and coordinate moves to PPCS.

7. Any inmate who does not meet the placement criteria shall be denied by the administrative officer in the Population Office. The reason for denial shall be indicated on the FAF in the packet and returned to the facility. The unit manager/case manager supervisor shall ensure the inmate is advised of this decision. The returned application packet shall be placed and retained in the classification file.

8. It shall be the responsibility of the administrative officer to advise the Pardon and Parole Board of all approved PPCS moves on a weekly basis. The out count placement coordinator shall also furnish a monthly report to the Pardon and Parole Board which shall include the status of all inmates recommended to the PPCS program. This report shall include:

a. All cancellations (to include the reason for cancellation).

b. All denials (to include the reason for denials).

c. Any special circumstances on pending placements.

9. The administrator of Classification and Programs shall ensure that the appropriate district attorneys and law enforcement officials are notified prior to inmates transferring to PPCS.

10. Facilities are responsible for ensuring inmates approved for PPCS placement have transportation arrangements and leaves, if necessary, to allow them to report to the probation and parole district office on time.

11. Any inmate who fails to report to the Probation and Parole district as dictated on the "Leave Form (DOC Form 090027)" shall be considered to have escaped from the sending facility while on leave.

V. References

Battle v. Anderson, No. 7295-CIV, E.D. Okl., March 1982

Standards for Adult Correctional Institutions, Second Edition. (September 1981). Standards 2-4305, 2-4479

Standards for the Administration of Correctional Agencies, Standard 80

21 O.S. 443
47 O.S. 11-902
57 O.S. 365
57 O.S. 510.1, 2
57 O.S. 561
74 O.S. 85.41

VII. Action

The associate director shall be responsible for compliance with these procedures.

Any exceptions to this operations memorandum require prior written approval from the director.

These procedures shall be effective 30 days after signing.

Deleted: Section 3, Chapter V, entitled "Procedures for the Placement of Inmates on an Out County Program" of the Offender Management and Services Manual, dated January 5, 1989.

Distribution: Policy and Operations Manuals

Signed: Gary D. Maynard, Director
Oklahoma Department of
Corrections 6/4/90

APPENDIX G

PARDON AND PAROLE BOARD PROCEDURE NO. 004-11 Effective 8-8-91

I. TITLE: Pre-Parole Conditional Supervision (PPCS)

II. PROCEDURE:

The Executive Director shall assist the Pardon and Parole Board to consider inmates for Pre-parole conditional supervision as required by law and shall issue criteria for consideration. Pre-parole conditional supervision is utilized when capacity at Department of Corrections institutions is ninety-two and one-half (92 1/2%) percent or above and will continue until ninety-two and one-half (92 1/2%) capacity is reached.

A. As directed by the Pardon and Parole Board, the Executive Director shall issue criteria for consideration of qualified inmates for pre-parole conditional supervision.

1. The Executive Director shall issue criteria for the selection of inmates and eligibility based on the amount of time served and the parole eligibility date. Criteria shall be periodically adjusted as needed to reduce the prison population through early

release. Statutory criteria for pre-parole conditional supervision eligibility include:

a. Inmate must have served fifteen (15%) percent of sentence by time of release on PPCS.

b. Inmate must be within one (1) year of the regularly scheduled initial parole consideration.

c. Also, inmates who are within twenty-one (21) months of their projected release date.

2. Administrative criteria for pre-parole conditional supervision eligibility shall include all except the following:

a. Inmates who have consecutive cases.

b. Inmates serving death sentences.

c. Inmates serving life without parole.

d. Inmates serving a controlling case for a parole violation.

e. Inmates with a docket for annual from escape.

3. The following guidelines shall apply to the calculation of pre-parole conditional supervision dockets:

a. Inmates must have served 15% of their time and be within two (2) to thirteen (13) months of their regularly scheduled docket date.

b. For those inmates who are serving indeterminate sentences, the fifteen (15%) percent shall be calculated on the maximum rather than the minimum sentence.

4. Inmates eligible for this program shall only be considered once prior to their initial parole consideration.

5. At an inmate's regularly scheduled docket it may be recommended that the inmate participate in the PPCS program prior to parole.

6. Inmates who are not recommended by the Board will be considered for parole on the regularly scheduled docket.

7. Inmates who are placed on PPCS and successfully reach their parole docket date will automatically be recommended for parole to the Governor at that time, or if serving a mandatory term will be recommended at their parole eligibility date.

8. Inmates who are denied by the Governor shall remain on PPCS and shall be reviewed by the Parole Board ninety days from denial to determine whether or not the Parole Board desires to allow the inmate to remain on PPCS.

9. The Executive Director shall coordinate the responsibilities of investigators for the preparation of pre-parole conditional supervision reports with the parole coordinator for the Department of Corrections.

a. The investigators will provide a report for each inmate eligible for pre-parole conditional supervision. The pre-parole report shall follow the definitions for investigative reports as defined in Procedure 006-2 and shall include:

(1) Docket month and year

(2) Parole docket date/reason

(3) Inmate's facility (abbreviation)

(4) Name of person preparing form

(5) Date prepared

(6) Inmate's name

(7) DOC number

(8) Date of birth/age

(9) Sex

(10) Controlling offense

(11) Sentence length

(12) County of conviction

(13) Felony case number

(14) Reception/rebill date

(15) Jail time

(16) Offense history

(17) Current release date

(18) Projected release date

(19) Number of prior incarcerations

(20) Security level

(21) Concurrent and/or consecutive cases or detainers

(22) Chronology of other felony convictions

(23) Official version of offense as indicated by a documented source

(24) Inmate's version of instant offense

(25) Institutional assignments and transfers

(26) Institutional disciplinary record

(27) Institutional participation program

(28) Institutional work performance

(29) Pre-parole plan

(30) Evaluation of previous adult community supervision and deferred sentences

(31) Juvenile institutionalization/supervision

(32) Substance abuse and mental health history and treatment

(33) Evaluation of disciplinary record

(34) Personal and family information

(35) Miscellaneous

(36) Recommendation

(37) Rationale and documentation or relevant comments supporting the recommendation, and any program stipulations. (Stipulated programs to be completed prior to or following release).

b. Investigators shall verify the accuracy and completeness of information with the file. The report shall be forwarded to the appropriate personnel as required by the deadline schedule.

c. If the inmate is found to be ineligible for pre-parole, the investigator shall send a memo to the Deputy Director with a recommendation that said inmate be removed from the PPCS docket.

III. BASIS FOR PROCEDURE:

A. Pardon and Parole Board Policy 004 - Establishment of docketing criteria for consideration of paroles, pre-parole conditional supervision, sentence commutations, leaves of absence and pardons.

B. To ensure compliance with 57 O.S.Supp. 1988, § 577 requiring pre-parole conditional supervision.

C. To provide guidelines for considering pre-parole conditional supervision to reduce prison crowding.

DATE APPROVED: 8/8/91

BY: RAY H. PAGE, EXECUTIVE DIRECTOR

ORIGINAL

No. 95-1598

Supreme Court, U.S.
FILED
APR 17 1996
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

LEROY L. YOUNG and
ATTORNEY GENERAL OF OKLAHOMA -- Petitioners

VS.

ERNEST EUGENE HARPER -- Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent asks leave to file the attached Brief in Opposition to Petition for a Writ of Certiorari without prepayment of costs and to proceed in forma pauperis.

[X] Respondent has previously been granted leave to proceed in forma pauperis in the following court(s): United States District Court for the Northern District of Oklahoma and United States Court of Appeals for the Tenth Circuit.

[ ] Respondent has **not** previously been granted leave to proceed in forma pauperis in any other court.

Respondent's affidavit or declaration in support of this motion is attached hereto.

Ernest E. Harper
ERNEST EUGENE HARPER, Pro se

RECEIVED
APR 22 1996
OFFICE OF THE CLERK
SUPREME COURT, U.S.

24 pp

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Ernest Eugene Harper, am the Respondent in the above-entitled case. In support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

I further swear that the responses I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes ✓ No___

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. $24.00 - Jacks Crabtree Correctional Center Rt. 1, Box 8, Helena, Oklahoma - 73741

b. If the answer is no, state the date of your last employment and the amount of salary or wages per month which you received. N/A

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? Yes___ No ✓

a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months. N/A

3. Do you own any cash or have a checking or savings account? Yes ✓ No___

a. If the answer is yes, state the total value of the items owned. Mandatory Prison Saving Account $322.40

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing) Yes___ No ✓

a. If the answer is yes, describe the property and state its approximate value. N/A

5. List the persons who are dependent upon you for support and state your relationship to those persons. None.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 4-16-96, 1996.

Ernest E. Harper

Ernest Eugene Harper, Pro se

No. 95-1598

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

LEROY L. YOUNG and
ATTORNEY GENERAL OF OKLAHOMA -- PETITIONERS

VS.

ERNEST EUGENE HARPER -- RESPONDENT

Brief In Opposition To Petition
For a Writ of Certiorari

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ERNEST EUGENE HARPER
Route 1 Box 8
Helena, Oklahoma 73741-9606

QUESTION(S) PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment requires that a State afford an individual some opportunity to be heard prior to revoking his participation in a supervised release program that allowed convicts to work and reside in society beyond the confines of a state penal institution and are thus free to enjoy most of the benefits of a normal life.

TABLE OF CONTENTS

QUESTION PRESENTED 1

STATEMENT OF THE CASE 2

A. TRIAL COURT PROCEEDINGS 3

B. THE COURT OF CRIMINAL APPEALS 3

C. UNITED STATES DISTRICT COURT 4

D. PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS 5

REASONS FOR DENYING THE WRIT

A. THE LOWER FEDERAL COURTS ARE UNIFIED ON THE ISSUE THAT INMATES ALREADY PARTICIPATING IN A SUPERVISED RELEASE PROGRAM ARE ENTITLED TO RECEIVE THE PROCEDURAL PROTECTIONS DESCRIBED IN MORRISSEY v. BREWER BEFORE THEY CAN BE REMOVED FROM THE PROGRAM 6

B. THE COURT OF APPEALS DID NOT DECIDE THE ISSUE IN A MANNER WHICH CONFLICTS WITH THE DECISION OF THE COURT OF CRIMINAL APPEALS, THE STATE COURT OF LAST RESORT, ON THE SAME IMPORTANT MATTER 9

C. PROGRAM PARTICIPANTS' STATUS IN THE PROGRAM IS ANALOGOUS TO PAROLEES ON PAROLE; THEREFORE THEY SHOULD BE TREATED THE SAME, AS A MATTER OF LAW AND AS A MATTER OF FAIRNESS 10

CONCLUSION 13

APPENDIX A 1a

Certificate of Probable Cause.

APPENDIX B 3a

Order Entered September 25, 1995, from the United States Court of Appeals granting leave to file Late Petition for Rehearing and Suggestion for Rehearing En Banc.

TABLE OF AUTHORITIES CITED

CASES — PAGE NUMBER

BRENNAN v. CUNNINGHAM, 813 F.2d 1 (1st Cir. 1987) 3

EDWARDS v. LOCKHART, 908 F.2d 299 (8th Cir. 1990) 5, 7, 8

GAGNON v. SCARPELLI, 411 U.S. 778 (1973) 8

HARPER v. YOUNG, 852 P.2d 164 (Okla.Crim.App.1993) 3

HEWITT v. HELMS, 459 U.S. 460 (1983) 8

MORRISSEY v. BREWER, 408 U.S. 471 (1972) 8, 10, 11

TRACY v. SALAMACK, 572 F.2d 393 (2d Cir. 1978) 7

UNITED STATES v. STEPHENSON, 928 F.2d 728 (6th Cir. 1991) 7

WHITEHORN v. HARRELSON, 758 F.2d 1416 (11th Cir. 1985) 8

STATEMENT OF THE CASE

Respondent, an inmate in the Oklahoma Department of Corrections, appearing pro se, challenged the constitutionality of the process by which he was terminated from the Preparole Conditional Supervision Program (the Program), a supervised release program similar to, although more restrictive than, parole that allows convicts to live and work in society. Those in the Program enjoy the freedom to be gainfully employed, to be with family and friends, and to form the other enduring attachments of normal life. Those who are selected to participate in the Program are chosen by the Oklahoma Pardon and Parole Board. Program participants are allowed to live and pursue studies or work outside correctional facilities under the close supervision of a parole officer. The Program required participants to have a home sponsor, maintain employment or pursue an education, refrain from drugs and alcohol, obtain approval before leaving their county of residence or buying a car, and obey all applicable Department of Corrections regulations. Violation of a condition may result in termination from the Program and a return to incarceration.

The Petitioners do not dispute that Respondent violated no rules or conditions of the Program; that he was removed from the Program because he was denied parole by the Govenor. Nothing in the rules or regulations governing the Program mandated that result. The regulations likewise contained no language suggesting that participants may be terminated "at

will" upon the denial of parole. The Petitioners do not here contend either that Respondent was terminated from the Program because of ineligibility.

Petitioners do not dispute that Respondent received verbal notice, by phone, of his renewed incarceration somewhat less than five hours before he was to turn himself in to authorities and that he was never granted any sort of hearing at which he could present evidence of any kind. The Petitioners do not here contend that Respondent received any of the other procedural safeguards required by due process or that he was afforded the less comprehensive process deemed necessary by the Court of Criminal Appeals in Harper v. Young, 852 P.2d 164 (Okla.Crim.App. 1993). Pet. App. at 40a.

A. TRIAL COURT PROCEEDINGS.

The Petitioners misstated the facts, in 1992, the Respondent, Ernest Eugene Harper, filed a petition for writ of habeas corpus with the District Court of Okfuskee County, State of Oklahoma, Case No. C-92-44, wherein Respondent claimed that he was denied due process of law when his participation in the Program was revoked without affording him a hearing. The District Court of Okfuskee County denied Respondent's application for writ of habeas corpus on May 19, 1992, finding habeas corpus was not the proper procedure to challenge revocation of PPCS status. Pet. App. at 39a.

B. THE COURT OF CRIMINAL APPEALS.

The Court of Criminal Appeals disagreed with the state district court and held that application for a writ of habeas

corpus is the appropriate remedy when a prisoner contends his confinement is unlawful. Pet. App. at 39a.

The Court directed the Attorney General of the State of Oklahoma to respond stating that, "[w]hen a prisoner is released from prison pursuant to a Preparole Conditional Supervision Program and lives outside institutional facilities, the Due Process Clause vests this person with a liberty interest in remaining in the Program. Therefore, the minimum requirements of Morrissey must be observed before a person can be removed from the Program for a rule or condition violation." The Court then reversed its position and held that "[t]he degree of confinement is not of concern to this Court, so long as an administrative procedure affords an appropriate method by which the decision to change the degree of confinement can be justified." Pet. App. at 40a.

The Court, addressing Pardon and Parole Procedure No. 004-11 which became effective some five months after Respondent was returned to prison, held that "[w]e believe such a procedure gives an inmate sufficient notice when he is placed in the Program that he may be removed from it when the governor exercises his discretion and declines to grant parole." Pet. App. at 41a. The Court denied Respondent's petition for writ of habeas corpus April 15, 1993.

C. UNITED STATES DISTRICT COURT.

On October 13, 1993, the Respondent filed a Petition for writ of habeas corpus with the District Court. Again, Respondent claimed that he was denied due process of law when

he was removed from the Program without a hearing. The District Court found that "[a]n inmate on the Program is granted a measure of liberty that lies between that of parolee and that of an inmate incarcerated in prison. A prisoner on the Program enjoys considerable liberty similar to a parolee." Pet. App. at 27a. The District Court refusing to adopt the Eighth Circuit's analysis in Edwards v. Lockhart, 908 F.2d 299 (8th Cir. 1990), denied the Respondent any relief. Pet. App. at 32a to 37a.

On February 13, 1995, the District Court filed a Certificate of Probable Cause finding Respondent had made "a substantial showing of the denial of a federal right." The District Court found that Respondent had made a substantial showing that the Tenth Circuit Court of Appeals could resolve the issue in this case differently." The District Court then cited Edwards v. Lockhart. Resp. App. "A".

D. PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS.

The Respondent timely appealed from the District Court's Order denying his petition for writ of habeas corpus. The Court of Appeals reversed the decision of the District Court and remanded with instructions to issue the writ of habeas corpus unless Respondent is reinstated to the Program by the State of Oklahoma. Pet. App. at 14a.

The Court of Appeals held that "[t]he passage outside the walls of a prison does not simply alter the degree of confinement; rather, it works a fundamental change in the kind of confinement, a transformation that signals the

existence of an inherent liberty interest and necessitates the full panoply of procedural protections outline in Morrissey." Pet. App. at 11a. The Court of Appeals finding no material distinction between the Program addressed in Edwards and that presented here, adopted the sound reasoning of the Eighth Circuit Court of Appeals. Pet. App. at 12a.

The decision of the panel was rendered on August 30, 1995. The Petitioners filed an untimely petition for rehearing and suggestion for rehearing en banc. On September 25, 1995, Opal Carter, Deputy Clerk, entered an Order for the Court granting Petitioners leave to file late petition for rehearing en banc, and Ordered the Respondent to file a response within 20 days from the date of the Order. Resp. App. "B". The Respondent timely filed a response to the late petition for rehearing. On February 13, 1996, the Court of Appeals issued an Order denying rehearing and suggestion for rehearing en banc. Pet. App. at 16a to 17a.

On February 28, 1996, the Court of Appeals issued an amendment to its Order denying rehearing, reflecting that five judges would have granted rehearing. Pet. App. at 18a to 19a.

REASONS FOR DENYING CERTIORARI

A. THE LOWER FEDERAL COURTS ARE UNIFIED ON THE ISSUE THAT INMATES ALREADY PARTICIPATING IN A SUPERVISED RELEASE PROGRAM ARE ENTITLED TO RECEIVE THE PROCEDURAL PROTECTIONS DESCRIBED IN MORRISSEY v. BREWER BEFORE THEY CAN BE REMOVED FROM THAT PROGRAM.

The Petitioners misstate the federal question that properly would be before the Court if certiorari was granted. The issue before this Court is not whether a supervised release program is more similar to parole or minimum security imprisonment, a question which substantially changes the substance of the question presented to the lower court. The question raised in the Court of Appeals, and properly before this Court is whether Respondent acquired a substantial, although conditional, freedom in the Program such that the loss of liberty entailed by its revocation is a serious deprivation requiring that he be accorded due process, and whether due process has been met.

Nothwithstanding the Petitioners' argument to the contrary, a review of the pertinent authorities, the Program here, and the programs addressed in Edwards, 908 F.2d at 302-03; United States v. Stephenson, 928 F.2d 728, 732 (6th Cir. 1991); and Tracy v. Salamack, 572 F.2d 393 (2d Cir. 1978), will reveal that a supervised release program which permits a convict to exist, albeit conditionally, in society on a full-time basis more closely resembles parole or probation than even the more permissive forms of institutional confinement; due process therefore mandates that Program participants receive at least the procedural protections described in Morrissey before inmates already participating in supervised release program may be removed from that program.

This Court has already determined that "[a] liberty

interest inherent in the Constitution arises when a prisoner has acquired a substantial, although conditional, freedom such that 'the loss of liberty entailed [by its revocation] is a serious deprivation requiring that the [prisoner] be accorded due process.'" Gagnon v. Scarpelli, 411 U.S. 778, 781 (1973). The First, Eighth, and Eleventh Circuits have each found independent Constitutional liberty interest where total release from institutional life has been revoked. See: Brennan v. Cunningham, 813 F.2d 1, 5-6 (1st Cir. 1987); Edwards v. Lockhart, 908 F.2d 299, 303 (8th Cir. 1990); and Whitehorn v. Harrelson, 758 F.2d 1416, 1420 (11th Cir. 1985).

This Court also was not persuaded by the argument that revocation is so totally a discretionary matter that some form of hearing would be administratively intolerable. This Court held that "[a] simple factual hearing will not interfere with the exercise of discretion." Morrissey, 408 U.S. at 484.

It is well settled that the Due Process Clause shields from arbitrary or capricious deprivation those facets of a convicted criminal's existence that qualify as "liberty interest". See Morrissey v. Brewer, 408 U.S. 471 (1972); Hewitt v. Helms, 459 U.S. 460 (1983). The Court of Appeals determined that "the liberty interest associated with life outside the walls of a penal facility dwarfs that available to an inmate." Furthermore, the Court of Appeals held that "[i]t is the ability to reside in a home of one's own, without bars or fences or bonds, beyond the immediate

authority of guards or warden" that signals the existence of an inherent interest. Pet. App. at 10a to 11a. Those in the Program enjoy the benefits and joys of gainful employment, the company of family and friends, and the pursuit of other enduring attachments of normal life.

There being no material distinction between the Program addressed here and in the other circuits, the Court should deny certiorari to review the Court of Appeals decision finding inherent liberty interest in continued placement in supervised release program that allowed convicts to live and work in society. This finding directly conforms with the finding of the other circuits.

Furthermore, the record conclusively demonstrates that Respondent received no prior written notice of revocation; no subsequent hearing or other opportunity to offer evidence, rebut arguments made against him, or argue on his own behalf; and, no meaningful explanation to the reasons for his termination from the Program. In sum, the record supports the conclusion that Respondent received no process at all before he was deprived of the freedom he had acquired in the Program.

B. THE COURT OF APPEALS DID NOT DECIDE THE ISSUE IN A MANNER WHICH CONFLICTS WITH THE DECISION OF THE COURT OF CRIMINAL APPEALS, THE STATE COURT OF LAST RESORT, ON THE SAME IMPORTANT MATTER.

As stated above, the Court of Criminal Appeals, in the Order directing response, concluded that, the Due Process Clause of the Fourteenth Amendment vests Program

participants with a liberty interest in remaining in the Program. Even in its Order denying Respondent's petition for writ of habeas corpus, the Court of Criminal Appeals held that "[t]he degree of confinement is not of concern to this Court, so long as an administrative procedure affords an appropriate method by which the decision to change the degree of confinement can be justified. Pet. App. at 40a. Clearly the Court of Criminal Appeals found that before removal from the Program the participant should be afforded some sort of procedural protections. The findings of the Court of Criminal Appeals is in accord with the Court of Criminal Appeals.

Respondent received none of the procedural safeguards required by Morrissey and was not even afforded the less comprehensive process deemed necessary by the Court of Criminal Appeals. In light of the Court of Criminal Appeals finding that Program participants cannot be subject to deprivation without adherence to some procedural safeguards, it cannot be reasonable argued that the decision of the Court of Appeals is in conflict with the decision of the Court of Criminal Appeals when it defines the procedural safeguards that must be met.

C. PROGRAM PARTICIPANTS' STATUS IN THE PROGRAM IS ANALOGOUS TO PAROLEES ON PAROLE; THEREFORE THEY SHOULD BE TREATED THE SAME, AS A MATTER OF LAW AND AS A MATTER OF FAIRNESS.

This Court defined parole in Morrissey v. Brewer, that definition should be consulted when comparing the two programs. Parole programs release inmates from incarceration

to the community and require participants to be subject to a number of specified conditions while on parole. These conditions restrict their activities substantially beyond the ordinary restrictions imposed by law on an individual citizen. Typically, parolees are forbidden to use liquor or to have associations or correspondence with certain categories of undesirable persons. Typically also, they must seek permission from their parole officers before engaging in specified activities, such as changing employment or living quarters, marrying, acquiring or operating a motor vehicle, traveling outside the community, and incurring substantial indebtedness. Additionally, parolee must regularly report to the parole officer to whom they are assigned and sometimes they must make periodic written reports of their activities. Morrissey, 408 U.S. at 478.

The Program also release inmates from incarceration to the community and require participants to be subject to a number of specified conditions to while on the Program. Those in the Program work and reside beyond the confines of a state penal institution and are thus free to enjoy most of the benefits of a normal existence. In return, a program participant must agree to abide by restrictions similar to those placed upon a parolee. He may be searched or visited at any time by his parole officer; must complete an itinerary for the next week's activities; must seek permission from his parole officer before engaging in specified activities, such as changing residence, marrying, acquiring or operating a

motor vehicle; cannot travel freely and may be subject to a curfew; cannot use drugs or alcohol or visit locations where those substances are likely to be present; may be urine-tested at any time; must pay monthly fees to the Department of Corrections; and may not assume debt or apply for public assistance without permission. Violation of a condition may result in termination from the Program and reincarceration. The Petitioners admit that Respondent violated none of these prohibitions.

While the Program has some differences from a parole program; both involve release of inmates from incarceration. Admittedly, the Program involves a greater degree of supervision than parole, requiring its participants to meet more often with their parole officers and to maintain gainful employment or to pursue a study program, as well as mandating other significant reporting and supervision requirements imposed by the State. Nevertheless, under the Program, Respondent lived completely outside an institutional setting.

Certainly, Respondent is subject to more constraints in the Program than he would if on parole. The constraints applied to the Respondent serve to guide him in the outside world, not, as the Petitioners argue, to confine him to the equivalent of institutional life. Both programs are sufficiently similar, in light of Morrissey, to conclude that the due process clause vests Respondent with a liberty interest, and that due process had not been met before he was terminated from the Program.

CONCLUSION

For the reasons stated above, the Respondent, Ernest Eugene Harper respectfully requests that this Court deny Petitioners' Petition for a Writ of Certiorari.

Ernest E. Harper

Ernest Eugene Harper, #260 SE
Route 1 Box 8
Helena, OK 73741-9606

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

_____

LEROY L. YOUNG and
ATTORNEY GENERAL OF OKLAHOMA -- PETITIONERS

VS.

ERNEST EUGENE HARPER -- RESPONDENT

_____

PROOF OF SERVICE

I, ERNEST EUGENE HARPER, do swear or declare that on this date, 4-17-96, 1996, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Jennifer B. Miller
Office of the Attorney General, Oklahoma
2300 N. Lincoln Blvd., Suite 112
Oklahoma City, Oklahoma 73105-4894

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 16, 1996.

Ernest Harper
ERNEST EUGENE HARPER

APPENDIX

Appendix "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
FEB 13 1995
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

ERNEST EUGENE HARPER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 93-C-948-B
	)	
LEROY L. YOUNG,	)	
	)	
Respondent.	)	

CERTIFICATE OF PROBABLE CAUSE

Before the Court is Petitioner's notice of appeal and request for a certificate of probable cause and leave to proceed on appeal in forma pauperis, filed on February 6, 1995. Petitioner desires to appeal the decision and order of this Court denying his petition for a writ of habeas corpus entered on January 10, 1995. The Petitioner is proceeding in forma pauperis.

28 U.S.C. § 2253 requires a petitioner to obtain a certificate of probable cause before appealing a final order in a habeas corpus proceeding under 28 U.S.C. § 2254. To receive a certificate of probable cause, a petitioner must "make a 'substantial showing of the denial of [a] federal right.'" Lozada v. Deeds, 498 U.S. 430, 431 (1991) (per curiam) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 (1983). A petitioner can satisfy this standard by demonstrating that the issues raised are debatable among jurists, that a court could resolve the issues differently, or that the questions deserve further proceedings. Barefoot, 463 U.S. at 893. The Tenth Circuit applies the same standard. See Stevenson v. Thornburgh, 943 F.2d 1214, 1216 (10th Cir. 1991).

After carefully considering the record in this case, the Court concludes that a certificate of probable cause should issue in this case. Petitioner has made a subscantial showing that the Tenth Circuit Court of Appeals could resolve the issue in this case differently. See Edwards v. Lockhart, 908 F.2d 299 (8th Cir. 1990). Determining that Petitioner raises issues that are debatable, the Court grants the application.

ACCORDINGLY, IT IS HEREBY ORDERED that a certificate of probable cause (doc. #16) is **granted**, Fed. R. App. P. 22(b), and that Petitioner's motion for leave to proceed in forma pauperis on appeal (doc. #16) is **denied as moot** because the Petitioner has been proceeding in forma pauperis since the inception of this suit.

SO ORDERED THIS 13 day of Feb., 1995.

THOMAS R. BRETT, Chief Judge
UNITED STATES DISTRICT COURT

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ERNEST EUGENE HARPER, Petitioner - Appellant,	)	
v.	)	No. 95-5026
LEROY L. YOUNG, and ATTORNEY GENERAL OF OKLAHOMA, Respondent - Appellee.	)	

ORDER

Filed September 25, 1995

Before SEYMOUR, Chief Judge, McKAY, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, HENRY, BRISCOE and LUCERO, Circuit Judges.

The court grants appellees leave to file a late petition for rehearing and suggestion for rehearing en banc.

Appellant shall file a response to the petition for rehearing and suggestion for rehearing en banc within 20 days from the date of this order.

Entered for the Court

PATRICK FISHER, Clerk

By: Opal A. Carter
Opal Carter, Deputy Clerk

Supreme Court, U.S.
FILED
AUG 1 1996
OFFICE OF THE CLERK

NO. 95-1598

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

LEROY L. YOUNG AND
ATTORNEY GENERAL OF OKLAHOMA,
Petitioners,

v.

ERNEST EUGENE HARPER,
Respondent.

On Writ of Certiorari to
The United States Court of Appeals
For The Tenth Circuit

JOINT APPENDIX

W.A. DREW EDMONDSON
Attorney General
JENNIFER B. MILLER*
Assistant Attorney General
112 State Capitol
Oklahoma City, OK 73105
(405) 521-3921
Counsel for Petitioners
*Counsel of Record

MARGARET WINTER
National Prison Project of
the ACLU Foundation, Inc.
1875 Connecticut Ave., N.W.
Suite 410
Washington, D.C. 20009
(202) 234-4830
Counsel for Respondent

PETITION FOR CERTIORARI FILED APRIL 4, 1996
CERTIORARI GRANTED MAY 28, 1996

30 PP

TABLE OF CONTENTS

Page

Relevant Docket Entries 1

Orientation for Pre-Parole Conditional Supervision 4

Rules and Conditions of Pre-Parole Conditional Supervision 7

Oklahoma Department of Corrections Facility Assignment Form 10

Motion for Appointment of Counsel Filed in the United States District Court for the Northern District of Oklahoma on June 20, 1994 13

Order of the United States District Court for the Northern District of Oklahoma entered February 28, 1996 15

Order of the United States Court of Appeals for the Tenth Circuit Court of Appeals wherein mandate recalled and stayed filed March 6, 1996 16

Docket Sheet for United States District Court for the Northern District of Oklahoma . . 17

General Docket For Tenth Circuit Court of Appeals 22

The Opinion of the United States Court of Appeals for the Tenth Circuit is not included in this Joint Appendix. The Opinion, together with the other Orders and Opinions of the Courts, was reprinted in the Petition for Writ of Certiorari.

RELEVANT DOCKET ENTRIES

DATE	ENTRY
December 6, 1993	Response to Petition for Writ of Habeas Corpus.
June 20, 1994	Motion by Ernest Eugene Harper for appointment of counsel.
August 25, 1994	Response to Order dated July 28, 1994.
January 9, 1995	Order of District Court for Northern District of Oklahoma denying Petition for Writ of Habeas Corpus.
August 30, 1995	Order of Tenth Circuit Court of Appeals reversing and remanding the Order of the Northern District of Oklahoma.
September 15, 1995	Petition for Rehearing and suggestion for rehearing *en banc*.
September 25, 1995	Order of Tenth Circuit Court of Appeals granting leave to file late petition for rehearing.
February 13, 1996	Order of Tenth Circuit Court of Appeals denying rehearing and suggestion for rehearing *en banc*.

February 21, 1996	Order of Tenth Circuit Court of Appeals issuing mandate.
February 26, 1996	Motion to recall and stay the mandate.
February 28, 1996	Order of District Court for Northern District of Oklahoma pursuant to opinion of Tenth Circuit dated August 30, 1995, that the Oklahoma Department of Corrections shall forthwith reinstate Petitioner Ernest Eugene Harper to the Pre-Parole Conditional Supervision Program (PPCS). Otherwise the Court will issue the writ of habeas corpus. While on the PPCS program, Petitioner shall not be removed therefrom without compliance with the due process procedure mandated by the Tenth Circuit Court of Appeals. Respondent to submit status report within twenty days.
February 28, 1996	Order of Tenth Circuit Court of Appeals correcting the order issued February 13, 1996 denying the Petition for Rehearing to reflect that five judges would grant a rehearing.

March 6, 1996	Order of Tenth Circuit Court of Appeals wherein mandate was recalled and stayed until final disposition by the United States Supreme Court.
March 6, 1996	Status report filed pursuant to district court Order of February 28, 1996 advising that on February 26, 1996 Motion to Recall Mandate and Application for Stay was filed in Tenth Circuit Court of Appeals, and that Petitioner had not been reinstated to PPCS and Respondent requests not to be ordered to reinstate Petitioner until ruling by the Tenth Circuit Court of Appeals.
April 4, 1996	Petition for Writ of Certiorari filed in United States Supreme Court.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 93-C-948-E

Ernest Eugene Harper,

Petitioner,

v.
Leroy L. Young, et al.

Respondent.

(Exhibit A to Response Filed 12/6/93)

ORIENTATION FOR PRE-PAROLE CONDITIONAL SUPERVISION

This orientation is provided to insure that each Offender is aware of the rule, responsibilities, expectations and possible consequences of not meeting these obligations.

DATE	INITIALS OFFENDER/STAFF		
10/16/90	E.H./J.B.D	1.	Reviewed, signed, and given copy of Rules and Conditions of Pre-Parole Conditional Supervision.
10/16/90	E.H./J.B.D.	2.	Reviewed violations of Rules and Conditions of Pre-Parole Conditional Supervision and possible results of such.

10/16/90	E.H./J.B.D.	3.	Reviewed financial obligations to include program support fees, trust fund account, restitution, etc.
10/16/90	E.H./J.B.D	4.	Reviewed medical procedures to include explanation that attending a private physician, with the exception of emergencies, will result in the Offender being responsible for all costs incurred. Also explained that the Offender may be returned to a DOC facility should medical needs necessitate.
10/16/90	E.H./J.B.D.	5.	Advised of goals of Pre-Parole Community Supervision.
10/16/90	E.H./J.B.D.	6.	Received reporting instructions and explanations of instructions.
10/16/90	E.H./J.B.D.	7.	Received Monthly Report Form with reporting date for first office visit.
10/16/90	E.H./J.B.D.	8.	Reviewed supervision and program review expectations to include contents of case plan.
10/16/90	E.H./J.B.D.	9.	Reviewed options available in the event of parole denial.

10/16/90	E.H./J.B.D.	10. Advised of Employment and Housing assistance availability.
10/16/90	E.H./J.B.D.	11. Advised if not employed within 30 days to be considered Program Failure.
1/16/90	E.H./J.B.D.	12. Advised of hours of operation.

I have received orientation in the above listed areas. I further understand that being classified to community level depends upon my compliance with each of these expectations. I understand that I may be directed to report any time and that failure to do so will result in escape procedures being initiated.

/S/ Ernest Harper 92301	10/16/90
Offender Name and Number	Date
/S/ Jack B. Davis	10/16/90
Employee Signature	Date

cc: District Office
Field File
Offender

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

(Title Omitted in Printing)

(Exhibit A to Response Filed 12/6/93)

RULES AND CONDITIONS OF PRE-PAROLE CONDITIONAL SUPERVISION

1. I will report as directed to the orientation scheduled on the date, time and place directed.

2. I will obey all city, state and federal laws. I will not own or possess a firearm or travel in a vehicle containing a firearm belonging to me or anybody else. I understand that at any time or place, I am subject to search. In addition, my vehicle and any property under my control is subject to search.

3. I will not, under any circumstances, leave the State of Oklahoma. I must obtain permission before leaving my county of residence.

4. Omitted in original.

5. I will report as directed by my officer in person and in writing on the forms provided by my officer. I understand my officer will visit me at home, work, or any other place without restriction to time. I also understand that I may be required to wear an electronic security monitoring device.

6. I will not use or possess drugs other than those legally prescribed by a physician. I will not use alcohol nor go onto the premises of places where alcoholic beverages are served to include; beer parlors, taverns, clubs, group meetings or parties where alcoholic beverages are served. I will submit to urinalysis or other forms of drug detection.

7. I will not lie or misrepresent the truth to any member of the Pardon and Parole Board, any employee of the Department of Corrections or any official of the government.

8. I understand that I am required to maintain full time employment unless involved in an approved full-time educational/vocational program. If unemployed, I will be required to be actively searching for employment and provide verification of search to my officer.

9. I will pay program support fees of $20.00 per month payable only in cashiers check or money order to the Department of Corrections.

10. I will not apply for any public, private or governmental assistance without prior written approval by my officer.

11. I understand that I am subject to curfew restrictions which shall be determined by my officer. If required, I will carry on my person at all times an itinerary approved by my officer in advance.

12. I will not enter into any charge accounts or credit applications for loans other than for educational expenses.

13. I understand that according to state statute, if I cannot be located for a twenty-four (24) hour period, I will be considered escaped. I hereby waive all extradition rights and agree to return to the State of Oklahoma and the Department of Corrections when directed.

14. I understand that waiving parole while on pre-parole status will result in reclassification to higher security status.

15. I will actively participate in the developed case plan and any subsequent amendments to the plan. Programs may include but are not limited to:

(a) Substance Abuse
(b) Employment
(c) Educational/Vocational
(d) Financial; i.e., court-related costs, restitutional
(e) Mental Health
(f) CSSF

16. Special conditions by the Pardon and Parole Board.

/S/ **Ernest Harper #92301 9/20/90 S/Kathy Britt, Sr. Cm**

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

(Title Omitted in Printing)

(Exhibit A to Response Filed 12/6/93)

OKLAHOMA DEPARTMENT OF CORRECTIONS
FACILITY ASSIGNMENT FORM

Date Stamped **RECEIVED**
MAR 21 1991
Facility Classification Unit

Recommending Facility: D-II PPCS

If Priority S./ A.S.
Population Office Pers. Initial

DOC # 92301 Date of Recommendation 3/14/91

Date Rec'd __/__/__
Population Office

Inmate's Last Name: Harper First: Ernest Race B Sex: M

I. Reason for Transfer (Mark Appropriate Items)

		Current Assigned Security:
___ Initial Placement	___ Service Agency	
___ Security Adjustment	___ House Arrest	
___ Medical Treatment	___ Pre-Hearing Detention	___ Max
___ Program Need	___ Return to Facility After	___ Med
___ Disciplinary Unit:	___ DU	___ Min
___ Number of days	___ Law Library Usage	___ Com Re:
___ Law Library Usage	___ Misconduct Expungement	X HA/PPCS
___ Parole Board Stipulation	___ LARC Re-Evaluation	
___ Mediation Hearing		
___ Transit Detention		
___ Protective Measures		
X Other: Parole Denied by Governor		

II. Brief Description of Reason for Transfer:

Parole Denied by Governor

III. Recommended Transfer:

Program Need Area
1st Priority _____ **Geographic Area** _____
2nd Priority _____ **Geographic Area** _____

IV. FCC Action

Concur: Yes ___
No ___ **If No Reason:** _____
Changed to: _____

Chairperson: /S/ Torrence Patrick Wilkins
Case Manager: /S/ Newt Scott
Inmate's Signature: /S/ Ernest Harper
___ **Routine** /S/ K. King Duvall **Date: 3/14/91**
Case Manager/Supervisor/Coordinator

X **Non-Routine**
Facility Head Review /S/ Bill McCullom **Date: 3/14/91**

(POPULATION OFFICE ACTION)

X **Concur** ___ **Do Not Concur** **Date of Assignment: 3/13/91**

The Inmate is Assigned to: J.L.C.C. **Waiting list:** ___**Yes** X **No**

/S/ Karen Stewart for J.T. **Date of Transfer: 3/14/91**
Signature of Population Coordinator

Forwarded to Coordinator of Facility Class. Date: __/__/__

Assignment Reason:
___ **Concur with Recommendation**
___ **Enhance Treatment Objective**

__ Administrative Adjustment (i.e., to achieve better racial distribution, reduce over-crowding, bedspace, etc.).
__ Other_____

___ Denied _____
Coordinator of Facility Class
Reason: _____

DISTRIBUTION: WHITE - Field File CANARY - Facility Classification
PINK - Inmate Copy

DOC 062040 (REV 9/86)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

No. 93-C-948-E

(Filed June 20, 1994)

(Title Omitted in Printing)

MOTION FOR APPOINTMENT OF COUNSEL

Petitioner, Ernest E. Harper, pursuant to 42 U.S.C. § 1915, requests this court to appoint counsel to represent him in this case for the following reasons:

1. Petitioner is not able to afford counsel.

2. The issues involved in this case are complex.

3. The last action in this case was filed in excess of 180 days ago giving rise to the complexity of the issues before the Court.

3.[Sic] The prison limits the hours that petitioner may have access to the prison law library and the law materials contained therein are very limited.

4. Petitioner has a limited knowledge of the law.

5. The ends of justice would best be served in this case if an attorney was appointed to represent the petitioner.

/S/ Ernest E. Harper
Ernest Eugene Harper, pro se
D.O.C. #92301
P. O. Box 308-F
Boley, Oklahoma 74829

CERTIFICATE OF MAILING

I, Ernest Eugene Harper, hereby certify that the executed original of the foregoing to which this Certificate is attached was served upon the below named Defense attorney, by placing the same in a sealed, postage fully prepaid envelope and depositing the same in the United States mail recorded at the John H. Lilley Correctional Center, Unit "F", P. O. Box 308, Boley, Oklahoma 74829, on the date set forth below.

Susan Brimer Loving
Attorney General
State of Oklahoma
112 State Capitol Building
Oklahoma City, Oklahoma 73105

Dated: 6-17-94 /S/ Ernest E. Harper
SIGNATURE
ERNEST EUGENE HARPER, PRO SE
P. O. Box 308-F
Boley, Oklahoma 74829

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA
No. 93-C-948-E

Ernest Eugene Harper,
Petitioner,
v.
Leroy L. Young, et al.
Respondent.

ORDER
Entered February 28, 1996

Pursuant to the opinion of the Court of Appeals for the Tenth Circuit dated August 30, 1995, the Oklahoma Department of Corrections shall forthwith reinstate Petitioner Ernest Eugene Harper to the Pre-parole Conditional Supervision program (PPCS).[1] Otherwise, the Court will issue the writ of habeas corpus. While on the PPCS program, Petitioner shall not be removed thereform [sic] without compliance with the due process procedure mandated by the Tenth Circuit Court of Appeals in Harper v. Young, Slip Op. No. 95-5026.

On or before twenty (20) days from the date of filing of this order, Respondent shall submit a status report informing the Court whether Petitioner was reinstated to the PPCS program.

SO ORDERED THIS 28th day of Feb., 1996.

/S/ **THOMAS R. BRETT**
THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

---

[1] On February 26, 1996, this Court received a certified copy of the order and judgment in this case from the Tenth Circuit Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ERNEST EUGENE HARPER,	)	
Petitioner - Appellant,	)	
	)	
v.	)	**No. 95-5026**
	)	
LEROY L. YOUNG AND	)	
ATTORNEY GENERAL OF	)	
OKLAHOMA,	)	
Respondents - Appellees.	)	

ORDER

Filed March 6, 1996

Before SEYMOUR, Chief Judge, MCKAY, and HENRY, Circuit Judges.

This matter comes on for consideration of appellees' motion to recall mandate and application for stay.

Upon consideration whereof, it is ordered that the mandate of this Court issued February 21, 1996, is recalled.

It is further ordered that the mandate is stayed until April 8, 1996, pending certiorari and that if, on or before that date, there is filed with the Clerk of the Court of Appeals a notice from the Clerk of the Supreme Court of the United States that appellees have timely filed a petition for writ of certiorari in the Supreme Court, the stay shall continue until final disposition by the Supreme Court.

Entered for the Court
PATRICK FISHER, Clerk
/S/ By: **Elisabeth A. Shumaker**
Elisabeth A. Shumaker, Chief Deputy

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA
Civil Docket For Case No. 93-CV-948

(Title Omitted in Printing)

* * * *

Proceedings include all events.

4:93 cv 948	Harper v. Young, et al.	REOPEN JSW
10/25/93 1	ORIGINAL file, certified copy of transfer order and docket sheet received from Eastern District of OK; Consent form and form letter mailed (ksb) (Entry date 10/26/93)	
10/25/93 1	MOTION by petitioner Ernest Eugene Harper to proceed in forma pauperis (filed in ED/Ok on 10/13/93) (ksb) (Entry date 10/26/93)	
10/25/93 1	ORDER granting motion to proceed in forma pauperis (1-1) (filed in ED/OK on 10/13/93) (ksb) (Entry date 10/26/93)	
10/25/93 1	PETITION for writ of habeas corpus (filed in ED/OK on 10/13/93) (ksb) (Entry date 10/26/93)	
11/4/93 2	ORDER by Chief Judge James O. Ellison; directing respondent to show cause why writ should not issue & file response to petition for WHC w/in 30 days of this date. (cc: all counsel) (ta) (Entry date 11/05/93)	
12/6/93 3	RESPONSE BY respondent Leroy L Young, respondent Attorney General OK to petition for WHC. (1-1) (ta)	

12/13/93 4 REPLY (BRIEF IN OPPOSITION) by petitioner Ernest Eugene Harper re response to petition for WHC. (3-1) (ta)

5/12/94 5 ORDER Case reassigned to Judge Thomas R. Brett (cc: all counsel) (pw) (Entry date 05/13/94)

6/20/94 6 MOTION by petitioner Ernest Eugene Harper for appointment of counsel. (ta)

6/27/94 7 ORDER by Judge Thomas R. Brett denying motion for appointment of counsel. (6-1) (cc: all counsel) (hc)

7/28/94 8 ORDER by Judge Thomas R. Brett re: habeas corpus petition (1-1) - respondnt shall supplmt his Rule 5 resp on or bfr 15 dys from date of entry of this order & Petitioner shall reply w/n 15 days thereafter. (dh) (Entry date 07/29/94)

8/16/94 9 MOTION by respondent Leroy L Young, respondent Attorney General OK to extend time to file supple resp (02J) (ta) (Entry date 08/17/94)

8/17/94 -- LETTER from petitioner Ernest Eugene Harper - sent to LC5 (pw)

8/18/94 10 ORDER by Judge Thomas R. Brett granting motion to extend time to file supple resp (9-1) until 9-25-94 (cc: mvt counsel) (pw) (Entry date 08/19/94)

8/19/94 11 OBJECTIONS by petitioner Ernest Eugene Harper to mot/enlrgmt of time to file supplemental resp (9-1) (Cpy2LC) (dh) (Entry date 08/22/94)

Docket as of July 16, 1996 11:51 am

Proceedings include all events. REOPEN
4:93 cv948 Harper v. Young, et al JSW

8/25/94 12 RESPONSE by respondent Leroy L Young, respondent Attorney General OK to order dated 7/28/94 (8-1) (dh) (Entry date 08/26/94)

8/30/94 13 REPLY by petitioner Ernest Eugene Harper to respondent's supplemental response to petition (1-1) (1-1) (dh)

1/9/95 14 ORDER ENTERED by Chief Judge Thomas R. Brett denying petition for a writ of habeas corpus (1-1) terminating case (cc: all counsel) (dh) (Entry date 01/10/95)

2/6/95 15 NOTICE OF APPEAL by petitioner Ernest Eugene Harper from Dist. Court decision, (14-2) (cc: all counsel, c21c5) (sf) (Entry date 02/07/95) (Edit date 02/07/95)

2/6/95 16 MOTION by petitioner Ernest Eugene Harper for certificate of probable cause (c21c5), and for leave to appeal in forma pauperis (c21c5) (sf) (Entry date 02/07/95)

2/13/95 17 ORDER by Chief Judge Thomas R. Brett granting motion for certificate of probable cause (16-1), denying motion for leave to appeal in forma pauperis as moot (16-2) for certificate of probable cause (cc: all counsel) (sf)

2/22/95 -- NOTIFICATION by Circuit Court of Appellate Docket Number 95-5026 (jcm)

2/22/95 -- RECORD on Appeal sent to Circuit Court re (15-1) (jcm)

3/13/95 -- NOTIFICATION by Circuit Court of Appellate Docket Number 95-5026 (jcm)

2/26/96 18 CERTIFIED COPY of judgment from USCA reversing and remanding the Decision of the District Court [Appeal [15-1] w/instructions to issue w/HC unless Mr. Harper is reinstated to Program by State of OK. After reinstatement, any attempt to remove Mr. Harper from Program must comply w/procedures mandated by this opinion; (cc: TRB-5) (cpo) (Entry date 02/27/96)

2/28/96 19 ORDER by Chief Judge Thomas R. Brett pursuant to opinion of 10th Cir. dated 8/30/95 ODC shall reinstate Petnr to Pre-parole Conditional Supervision program (PPCS), otherwise Crt issue w/HC; while on PPCS program, Petnr shall not be removed w/o compliance w/due process procedure mandated by 10th Cir.; w/i 20 days from filing of this O, Respondent submit status rpt informing Crt whether Ptnr reinstated to PPCS program, (cc: all counsel) (cpo) (Entry date 02/29/96)

Docket as of July 16, 1996 11:51 am

Proceedings include all events. REOPEN
4:93 cv 948 Harper v. Young, et al JSW

3/6/96 20 STATUS REPORT by respondent Leroy L Young pursuant to Crt's O; advising: on 2/26/96 a m/recall mandate and m/stay fld in 10th Cir; Respondent has not reinstated Petnr to PPCS and requests not ordered to do so until ruling by 10th Cir; and if 10th Cir. denies mtn, Respondent will request stay of mandate from U.S. Supreme Crt; (C21c, mail-cpy rtnd) (cpo) (Entry date 03/07/96) (Edit date 03/07/96)

3/11/96 21 COPY of Order from Circuit Court: upon Appellees' motion to recall mandate and mtn to stay; mandate of Crt issued 2/21/96 is recalled; mandate stayed until 4/8/96 pending certiorari, if on/before that date, there is filed w/Clk of Crt of App a ntc from Clk of Supreme Crt that appellees timely filed p/writ of cert in Supreme Crt, stay shall continue until final disposition by supreme crt (cc: TRB-5) (cpo) (Entry date 03/12/96)

3/14/96 -- REMARK; original mandate returned to 10th per order of 2/26. (am)

4/19/96 -- LETTER from USCA re (15-1); clerk of supreme ct has notified US Ct of appeals that a petition for writ of certiorari was filed in case on 4/4/96 and assigned supreme ct number 95-1598 (sad) (Entry date 04/22/96)

6/6/96 -- LETTER from USCA re (15-1) advising certiorari granted on 5/28/96; Supreme Crt No. 95-1598 (cpo) (Entry date 06/07/96)

7/11/96 -- LETTER from USCA re (15-1) advising certiorari has been granted; 10th no longer in possession of DC record; DC to transmit record to US Supreme Crt (Sup Crt no. 95-1598) (cpo) (Entry date 07/16/96)

7/11/96 -- LETTER from USCA address to Supreme Crt re (15-1) encl certiorari record; advising DC will forward record on appeal (cpo) (Entry date 07/16/96)

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

General Docket For
Tenth Circuit Court of Appeals

(Title Omitted in Printing)

* * * *

Docket as of March 20, 1996 0 15 am Page 3

Proceedings include all events.
95-5026 Harper v. Young, et al

2/15/95	Civil Case docketed. Certificate of probable cause due 3/20/95 for Ernest Eugene Harper N district court. (tl)
2/17/95	Pro se docketing statement filed by Ernest Eugene Harper. Original and 0 copies c/s. y. (tl)
2/21/95	Notification of granting of probable cause in district court (tl)
2/24/95	Pro se notice of appearance filed by Ernest Eugene Harper. CERT. OF INTERESTED PARTIES (y/n): n (oac)
2/24/95	Appellant's brief filed by Ernest Eugene Harper. Original and 2 copies. c/s y. Served on 2/13/95 Oral argument? pro se (oac)

2/24/95	Record on appeal filed: I Volume(;) - Copy filed in Volume(s) (y/n): y. Served on 2/22/95 (oac)
3/2/95	Notice of appearance filed by Jennifer B. Miller as attorney for Leroy L. Young. CERT OF INTERESTED PARTIES (y/n): n (tl)
3/7/95	Jurisdictional review complete. Record on appeal due 3/17/95 from dist. court; Notice of appearance due 3/17/95 for Jennifer B. Miller; (Appellant's pro se brief and notice of appearance already filed). (ss)
3/7/95	Order filed by PF - Appellee's brief due 4/6/95 for Attorney General. for Leroy L. Young pursuant to FRAP 31(a) and Rule 31.2. (No formal order. this is pursuant to jur. rvw complete. appellant's brief has been filed). Parties served by mail. (ss)
3/16/95	Pro se notice of appearance filed by Ernest Eugene Harper. CERT OF INTERESTED PARTIES (y/n): n (tl)
3/17/95	Notice of appearance filed by Jennifer B. Miller as attorney for Leroy L. Young. CERT. OF INTERESTED PARTIES (Y/N): n (tl)
4/5/95	Appellee's brief filed by Leroy L. Young. Attorney General. Original and 7 copies. /s: y. Served on 4/3/95 Oral Argument? n Appellant's optional reply brief due 4/20/95 for Ernest Eugene Harper (tc)

4/13/95 Appellant's reply brief filed by Ernest Eugene Harper. Original and 3 copies. c/s. y (pdw)

4/28/95 Case submitted to panel on the briefs pursuant to Rule 34. (tl)

Docket as of March 20, 1996 0:15 am Page 4

Proceedings include all events.
95-5026 Harper v. Young, et al

8/30/95 Terminated on the Merits after Submission Without Oral Hearing; Reversed and Remanded. Written Signed, Published. Seymour, McKay. authoring Judge; Henry [95-5026] (tl)

9/15/95 Petition for rehearing in banc filed by Leroy L. Young, Attorney General. Original and 7 copies c/s y (tl)

9/15/95 Document [884878-1] Petition for rehearing in banc filed by Appellee Leroy L Young, Attorney General submitted to panel. (tl)

9/25/95 Order filed by Judge(s) Seymour, Moore, Anderson, Tacha, Baldock, Brorby, Ebel, Kelly, Henry, Briscoe, Lucero, McKay - appellee's response to petition for rehearing due 10/10/95 for Attorney General. Parties served by mail. (tl)

10/6/95 Appellant's response filed by Ernest Eugene Harper Petition for rehearing in banc and submitted to panel. Original and 12 copies. c/s: y (tl)

1/25/96 Appellant's motion for enlargement on personal recognizance bond without surety and brief in support of filed by Appellant Ernest Eugene Harper [95-5026] Original and 3 copies c/s: y (tl)

1/29/96 Appellee's response to request for enlargement on personal recognizance bond without surety filed by Leroy L. Young, Attorney General. Original and 3 copies. C/s: y (tl)

1/29/96 Appellant's request for enlargement on personal recognizance bond with surety and brief in support of and appellee's response submitted to panel. (tl)

2/13/96 Order filed by Judge(s) Seymour, McKay, Porfilio, Anderson, Tacha, Baldock, Brorby, Ebel, Kelly, Henry, Briscoe, Lucero. Murphy denying Petition for rehearing in banc (884878-1) (tc)

2/16/96 Order filed by Judge(s) Seymour, McKay, Henry denying Appellant/Petitioner request for enlargement on personal recognizance bond without surety. (Considered as a motion for release.) [915606-1] Parties served by mail. (OAC)

2/21/96 Mandate issued. (tl)

2/26/96 Appellee's motion to to recall the mandate and for stay pending certiorari and brief in support of filed by Leroy L. Young, Attorney General and submitted to panel. (tl)

Proceedings include all events
95-5026 Harper v. Young, et al

2/28/96 Order filed by Judge(s) Seymour, McKay, Porfilio, Anderson, Tacha, Baldock, Brorby, Ebel, Kelly, Henry, Briscoe, Lucero, Murphy correcting 2/13/96 order denying petition for rehearing and suggestion for hearing in banc to state that Judges Anderson, Tacha, Baldock, Brorby and Kelly voted to grant rehearing
Parties served by mail (tl)

3/4/96 Mandate receipt filed (tl)

3/6/96 Order filed by Judge(s) Seymour, McKay, Henry, granting Appellee/Respondent motion to recall the mandate [924081-1] Returned mandate receipt due 3/18/96 for Beebe, Caslavka, granting Appellee/Respondent motion for stay of mandate pending filing of certiorari. Response due for Attorney General 4/8/96 [924081-2] 4/8/96 for Attorney General Parties served by mail. (tl)

3/8/96 Appellant's response filed by Ernest Eugene Harper to Appellee motion to recall the mandate and submitted to panel. Original and 3 copies. c/s: y (tl)

3/18/96 Recalled mandate returned from district court (tl)

3/18/96 Appellant's motion for review by the court of the Order of the clerk filed by Appellant Ernest Eugene Harper (docketed as motion to reconsider court's order of 3/6/96.) Original and 3 copies c/s: y. (tl)

3/19/96 Appellant's motion for reconsideration submitted to panel. (tl)

(3)

Supreme Court, U.S.
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NO. 95-1598

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

LEROY L. YOUNG AND
ATTORNEY GENERAL OF OKLAHOMA,
Petitioners,

v.

ERNEST EUGENE HARPER,
Respondent.

On Writ of Certiorari to
The United States Court of Appeals
For The Tenth Circuit

BRIEF OF THE PETITIONERS

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QUESTION PRESENTED

Oklahoma's Preparole Program vests the Corrections Department with the discretion to permit inmates to serve their sentences outside of correctional facilities. Under the Program, inmates: (1) remain in the custody of the Corrections Department; (2) are subject to prosecution for escape; and (3) are subject to Department disciplinary proceedings. In light of the nature of Oklahoma's Preparole Program, the question presented is:

> Whether inmates, once placed on Oklahoma's Preparole Conditional Supervision Program, have a liberty interest protected by the Due Process Clause of the Fourteenth Amendment in continued participation in the Program?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED 1

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 3

STATEMENT OF THE CASE 6

A. PROCEEDINGS IN THE HIGHEST STATE COURT 7

B. PROCEEDINGS IN THE DISTRICT COURT 8

C. PROCEEDINGS IN THE COURT OF APPEALS 9

SUMMARY OF ARGUMENT 10

ARGUMENT 13

PROPOSITION

PLACEMENT ON THE PROGRAM DOES NOT FURNISH AN INMATE A LIBERTY INTEREST IN CONTINUED PARTICIPATION IN SUCH PROGRAM PROTECTED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT 13

A. DUE PROCESS CLAUSE 13

B. STATE-CREATED LIBERTY INTEREST 26

CONCLUSION 33

TABLE OF AUTHORITIES

CASES CITED

PAGE

Barnett v. Moon,
852 P.2d 161 (Okla. Crim. App. 1993) 2, 7

Board of Regents of State Colleges v. Roth,
408 U.S. 564 (1972) 16

Bowser v. Vose,
968 F.2d 105 (1st Cir. 1992) 15

Connecticut Board of Pardons v. Dumschat,
452 U.S. 458 (1981) 29

Dominique v. Weld,
73 F.3d 1156 (1st Cir. 1996) 30

Edwards v. Lockhart,
908 F.2d 299 (8th Cir. 1990) 9, 21

Gettings v. Page,
442 P.2d 534 (Okla.Crim.App.1968) 32

Hewitt v. Helms,
459 U.S. 460 (1983) 13, 25

Kentucky Department of Corrections v. Thompson,
490 U.S. 454 (1989) 25

Meachum v. Fano,
427 U.S. 215 (176) 11, 12, 13, 14, 18
19, 20, 21, 22, 23, 27, 28, 30, 31, 32

Meyer v. Nebraska,
262 U.S. 390 (1923) 16

Morrissey v. Brewer,
408 U.S. 471 (1972) 7, 9, 10, 11, 12, 13
15, 17, 18, 22, 23, 24

Sandin v. Conner,
515 U.S. ___, 132 L. Ed. 2d 418 (1995) .. 12, 18, 27, 28
29, 30, 32

Smith v. Saxbe,
562 F.2d 729 (D.C.Cir.1977) 15

Twyman v. Crisp,
584 F.2d 352 (10th Cir. 1978) 32

United States v. Taylor,
47 F.3d 508 (2d Cir. 1995) 20, 21

Vitek v. Jones,
445 U.S. 480 (1980) 8, 25, 26

Wolff v. McDonnell,
418 U.S. 539 (1974) 12, 24, 26, 27, 28, 29, 30

STATUTES CITED

28 U.S.C. § 1254(1) 2

Okla. Stat. tit. 21, § 443 (1991) 5, 10, 19, 31

Okla. Stat. tit. 57, § 347 (1991) 17

Okla. Stat. tit. 57, § 365 (Supp. 1990) 3, 6, 10, 11
12, 14, 15, 17, 18, 19, 24, 28, 31, 32

Okla. Stat. tit. 57, § 510 (1991) 24, 32

Okla. Stat. tit. 57, § 512 (Supp.1993) 17

Okla. Stat. tit. 57, § 571 ..... 3, 4

Ala. Code § 14-8-110, et seq. (1995) 14

Ariz. Rev. Stat. Ann. § 41-1604.13 (Supp.1995) 14

Del. Code Ann. tit. 11, § 6539 (1995) 14

Ill. Ann. Stat. ch. 730, para. 1005-8A-3 (1995) 14

Md. Code Ann., Crim. Law § 689A (1992) 14

Mich. Comp. Laws § 791.265(h) (Supp.1996) 14

Miss. Code Ann. § 47-5-1003 (Supp.1996) 14

Mo. Ann. Stat. § 217.541 (1995) 15

Neb. Rev. Stat. § 83-185 (Cum.Supp.1972) 26

Nev. Rev. Stat. § 209.392 (1995) 15

Vt. Stat. Ann. tit. 28, § 808 (1995) 15

Wis. Stat. Ann. § 301.048 (1995) 15

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV (Section 1) 3

OTHER AUTHORITY

Bureau of Justice Statistics,
U. S. Department of Justice,
1994 Sourcebook of Criminal Justice
Statistics 537 (Kathleen Maguire and
Ann L. Pastore eds., 1995) 14

NO. 95-1598

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

LEROY L. YOUNG AND
ATTORNEY GENERAL OF OKLAHOMA,
Petitioners,

v.

ERNEST EUGENE HARPER,
Respondent.

On Writ of Certiorari to
The United States Court of Appeals
For The Tenth Circuit

BRIEF OF THE PETITIONERS

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit is reported at 64 F.3d 563 and is reprinted in the Appendix to the Petition for Writ of Certiorari at pages 1a to 15a.[1] The Order of February 13, 1996, denying the Petition for

[1]References to the Appendix to the Petition for Writ of Certiorari will hereinafter being with "Pet. App." and will be further identified by the page number assigned thereto. In (continued...)

Rehearing and Suggestion for Rehearing En Banc is unreported. Pet. App. at 16a to 17a. The Order of February 28, 1996, reflecting that five judges would have granted rehearing is unreported. Pet. App. at 18a to 19a.

The District Court's Order entered January 10, 1995 is unreported. Pet. App. at 20a to 37a. Additionally, the Opinion of the Oklahoma Court of Appeals is reported at 852 P.2d 164. Pet. App. at 38a to 42a.

STATEMENT OF JURISDICTION

The Judgment and Opinion of the Court of Appeals was entered on August 30, 1995. Pet. App. at 1a to 15a. The Order denying Petition for Rehearing and Suggestion for Rehearing En Banc was denied on February 13, 1996. Pet. App. at 16a to 17a. The Petition for Writ of Certiorari was filed in this Court on April 4, 1996, and was granted on May 28, 1996. The jurisdiction of this Court in invoked pursuant to 28 U.S.C. § 1254(1).

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[1](...continued)
addition, reference to the Joint Appendix will hereinafter begin with "Jt. App." and will be further identified by the page number assigned thereto.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTIONAL PROVISIONS:

U.S. Const. amend. XIV (Section 1):

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES:

Okla. Stat. tit. 57, § 365 (Supp. 1990):

> **Preparole Conditional Supervision Program**
>
> A. Whenever the population of the prison system is certified by the State Board of Corrections as exceeding ninety-five percent (95%) of its capacity, as defined in Section 571 of Title 57 of the Oklahoma Statutes, the Department of Corrections and the Pardon and Parole Board shall implement a Preparole Conditional Supervision Program until such time as the population is reduced to ninety-two and one-half percent (92 1/2%) of capacity, for persons in the

custody of the Department of Corrections who meet the following guidelines:

1. Only inmates who are otherwise eligible for parole, pursuant to Sections 332.7 and 332.8 of Title 57 of the Oklahoma Statutes, shall be eligible to participate in this program; and

2. An inmate shall serve at least fifteen percent (15%) of his sentence of incarceration and be within one (1) year of his regularly scheduled parole consideration date or be within one (1) year of his projected release date, prior to being eligible for this program.

B. Upon an inmate becoming eligible for this program it shall be the duty of the Pardon and Parole Board, with or without application being made, to cause an examination to be made of the criminal record of the inmate and to make inquiry into the conduct and the record of said inmate during his confinement in the custody of the Department of Corrections.

C. Upon favorable recommendation by the Pardon and Parole Board, notification shall be made to the Department of Corrections that said inmate has been recommended to be placed in this program.

D. Prior to the placement of an inmate on Preparole Conditional Supervision, the Department shall provide written notification to the sheriff and district attorney of the county in which any person on Preparole Conditional Supervision is to be placed and to the chief law enforcement officer of any incorporated city or town in which said person is to be placed of the placement of the person on Preparole Conditional Supervision within the county or incorporated city or town. The Department also shall provide written notification of the placement of the person on Preparole Conditional Supervision within the county or incorporated city or town to any victim of the crime for which the inmate was convicted by mailing the notification to the last-known address of the victim, if such information is requested by the victim. The Department of Corrections shall not give the address of the inmate to any victim of the crime for which the inmate was convicted.

E. Should an inmate violate any rule or condition during the period of community supervision, the inmate shall be subject to disciplinary proceedings as established by the Department of Corrections.

F. Any inmate who escapes from this program shall be subject to the provisions of Section 443 of Title 21 of the Oklahoma Statutes.

STATEMENT OF THE CASE

This matter addresses the issue of whether the Pre-Parole Conditional Supervision Program[2] (the "Program") which is supervised and regulated by the Oklahoma Department of Corrections ("DOC"), but allows an inmate to enter and live in the community, is tantamount to parole. A determination of the issue is required to resolve the issue of whether an inmate placed in the Program has a liberty interest in continued participation in such Program.

The Respondent is an inmate in custody of the Oklahoma Department of Corrections. On October 16, 1990, the Respondent was placed on the Program. The Respondent was to abide by certain rules and conditions. The Respondent was advised of such rules and conditions and also advised concerning the options available in the event of parole denial. The Respondent was aware that this was merely a transfer to a lower security status and that he remained within the custody and confines of the DOC.[3] Jt. App. at 4-6.

On March 14, 1991, the Respondent's classification as a program participant was terminated because the Governor of the State of Oklahoma had denied the Respondent parole. The Respondent was notified of the parole denial and then, without a hearing, transferred to a more secure facility. Jt. App. at 10-12.

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[2]See Okla. Stat. tit. 57, § 365 (Supp. 1990).

[3]The Respondent signed an orientation form and a copy of the rules and conditions of the Program which reveals he was aware of the options if parole was denied and aware that he was merely being placed on a lower security status within the DOC. See Jt. App. at 4-6, para. 14.

A. Proceedings in the Highest State Court.

In 1992, the Respondent filed a petition for writ of habeas corpus with the Oklahoma Court of Criminal Appeals alleging that he was improperly removed from the Program without the due process requirements set forth in Morrissey v. Brewer, 408 U.S. 471 (1972). At the same time that the Court of Criminal Appeals was considering the Respondent's petition, another inmate, Matthew W. Barnett, had a similar action pending before the Court. See Barnett v. Moon, 852 P.2d 161 (Okla. Crim. App. 1993).

The primary difference between the two actions, however, was that Mr. Barnett had been removed from the Program for disciplinary reasons.[4] The Respondent, however, was removed from the Program because he had been denied parole by the Governor of the State of Oklahoma. See Harper v. Young, 852 P.2d 164, 165 (Okla. Crim. App. 1993). Jt. App. at 10-12.

The Court of Criminal Appeals held that the Respondent was aware, when placed on the Program, that if denied parole he may be removed from the Program. Thus, the Respondent had suffered no due process violation.[5] Pet. App. at 38a to 42a.

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[4]Mr. Barnett was arrested for public drunk. Barnett, 852 P.2d at 163.

[5]In Barnett, the Court held that due to the disciplinary reason for the removal, Mr. Barnett was entitled to due process set forth in Wolff v. McDonnell, 418 U.S. 539 (1974). Mr. Barnett was not only returned to an institutional facility but also lost good time credits.

B. Proceedings in the District Court.

On October 13, 1993, the Respondent filed a Petition for Writ of Habeas Corpus with the United States District Court for the Northern District of Oklahoma ("District Court"). Again, Respondent alleged that he was denied due process when removed from the Program. The District Court, after discussing whether the Respondent had a liberty interest in remaining on the Program under the Fourteenth Amendment or created by state law, denied the Respondent any relief. Pet. App. at 20a to 37a.

The District Court discussed the many differences between parole and the Program. The District Court concluded that because the Respondent had not been released from institutional life altogether, he did not have a liberty interest in remaining on the Program protected by the Fourteenth Amendment. Pet. App. at 34a to 35a. The District Court held:

> Although Petitioner [Respondent herein] was permitted to live outside an institution, work and interact with family and friends, his release from institutional life was conditioned on obtaining parole. Moreover, Petitioner's [Respondent's] return to the general prison population did not subject him to confinement beyond the sentence initially imposed upon him. See Vitek, 445 U.S. at 480.

Pet. App. at 34a to 35a. The District Court also found that the state had not created a liberty interest in remaining on the Program. Pet. App. at 35a to 37a.

C. Proceedings in the Court of Appeals.

The Respondent timely appealed from the District Court's Order denying his petition for writ of habeas corpus. A three-judge panel of the United States Court of Appeals for the Tenth Circuit ("Court of Appeals") reversed the decision of the District Court. Pet. App. at 1a to 15a.

The Court of Appeals held that placement on the Program furnishes an inmate a liberty interest in continued participation protected by the Fourteenth Amendment. The Court of Appeals held, in accordance with the Eighth Circuit Court of Appeals in Edwards v. Lockhart, 908 F.2d 299 (8th Cir. 1990), that when a program releases an inmate into society on a full-time basis, the program more closely resembles parole or probation than any other form of institutional confinement. Pet. App. at 12a. Thus, the Court of Appeals held that the Respondent was entitled to the procedural safeguards provided in Morrissey v. Brewer. Pet. App. at 12a.

Petitioner filed a petition for rehearing and suggestion for rehearing en banc. On February 13, 1996, the Court of Appeals issued its Order denying rehearing and suggestion for rehearing en banc. Pet. App. at 16a to 17a. On February 28, 1996, the Court of Appeals issued an amendment to its Order denying rehearing, reflecting that five judges would have granted rehearing. Pet. App. at 18a to 19a.

The Petitioner filed a motion to recall mandate and application for stay. On March 6, 1996, the Court of Appeals issued an Order recalling the mandate and stayed the issuance of the mandate pending the Petitioner's filing for writ of certiorari with this Court. Jt. App. at 16.

SUMMARY OF ARGUMENT

In 1988, the Oklahoma State Legislature enacted a program to assist in alleviating the prison overcrowding crisis with the State. The Program provides that the Program shall be utilized whenever the prison population exceeds ninety-five percent (95%) of its capacity. The Program will then continue until the population is reduced to ninety-two and one-half percent (92 1/2%) of capacity. Okla. Stat. tit. 57, § 365 (Supp. 1990).

Okla. Stat. tit. 57, § 365 (Supp. 1990), sets forth the guidelines which inmates must meet before they are eligible for consideration. In addition, Section 365 provides that an inmate who participates in the Program shall be subject to disciplinary procedures of the DOC. Additionally, the statute provides that if an inmate escapes from the Program, the inmate shall be subject to prosecution for the crime of escape pursuant to Section 443 of Title 21 of the Oklahoma Statutes.

The Respondent was placed on the Program on October 16, 1990. Jt. App. at 4. On March 14, 1991, after being denied parole by the Governor of the State of Oklahoma, the Respondent was reclassified to a higher security status and not permitted to participate in the Program. Jt. App. at 10-12. The Respondent did not receive any type of hearing before being transferred to a higher security facility.

The Court of Appeals determined that the Respondent had a liberty interest in continued participation in the Program because the Program is more similar to parole than to minimum security imprisonment. Thus, the Court of Appeals concluded that the Respondent was entitled to a hearing pursuant to Morrissey v. Brewer, 408 U.S. 471 (1972) before he was removed from the Program and given a higher security classification. Pet. App. at 1a to 15a.

The judgment of the Court of Appeals must be reversed for the reasons that the Court of Appeals (1) misanalyzed the actual confines in which an inmate placed on the Program must abide; and (2) ignored the fact that the determination of whether to place an inmate in a more secure facility, particularly in this matter where the Respondent was denied parole, is not a factual determination but is purely predictive and discretionary.

First, the Court of Appeals was in error when it held that a liberty interest was created merely because an inmate on the Program is not confined behind four institutional walls. In Morrissey v. Brewer, 408 U.S. at 482, this Court held that the determinative factor of whether a liberty interest exists is the nature of the interest involved, rather than its weight. See also Meachum v. Fano, 427 U.S. 215, 224 (1976). The nature of the interest involved in this matter is a degree of confinement from which an inmate may be transferred if he is denied parole, violates any rule or condition of the Program or for any other reason at the discretion of the DOC.

In Meachum v. Fano, this Court specifically held that an inmate holds no liberty interest in his or her place or degree of confinement. Meachum v. Fano, 427 U.S. at 224. Likewise, whatever deprivation an inmate on the Program experiences by virtue of the change in the degree of confinement and resultant classification to a more supervised prison environment does not encroach on any liberty interest protected by the Due Process Clause itself.

An inmate on the Program is treated just as an inmate behind four institutional walls. The inmate remains in the custody of the DOC, is subject to DOC disciplinary proceedings and will be considered an escapee if he fails to report as required. Okla. Stat. tit. 57, § 365 (Supp. 1990). For these reasons, an inmate on the Program is not similar to a parolee but is most similar to an

inmate residing in a minimum security prison. Thus, an inmate on the Program does not have a liberty interest in continued participation in the Program protected by the Due Process Clause itself.

In addition, the State of Oklahoma has not created a liberty interest in continued placement on the Program. Transfer from the Program to a higher security status does not impose an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life". Sandin v. Conner, 515 U.S ___, 132 L.Ed.2d 418, 430 (1995). The inmate's term of confinement is not lengthened by such transfer as is routine with parole or with the revocation of earned credits.

Furthermore, the alleged deprivation is consistent with the inmate's sentence. The inmate is aware that if parole is denied he may be transferred from the Program. Thus, any alleged deprivation is foreseeable and not unexpected. Accordingly, the Respondent, nor any inmate placed on the Program, does not have a liberty interest in remaining on the Program.

Second, a hearing pursuant to Morrissey v. Brewer is not required because, in the event of parole denial, there are no factual determinations to be made as with parole revocation. Just as in Meachum v. Fano the determination of whether to transfer an inmate is purely predictive and discretionary. Thus, a Morrissey hearing is not necessary to assure that the facts are verified or that the decision maker has an "accurate knowledge of the [inmate's] behavior". Morrissey v. Brewer, 408 U.S. at 484.

Likewise, a disciplinary hearing pursuant to DOC guidelines and Wolff v. McDonnell, 418 U.S. 539 (1974), as mandated by Okla. Stat. tit. 57, § 365 (Supp. 1990), is sufficient to ensure that an inmate is not arbitrarily disciplined due to a rule

violation. The determination of the Court of Appeals that a Morrissey hearing is required must be reversed.

ARGUMENT

PROPOSITION

PLACEMENT ON THE PROGRAM DOES NOT FURNISH AN INMATE A LIBERTY INTEREST IN CONTINUED PARTICIPATION IN SUCH PROGRAM PROTECTED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

This Court has held that liberty interests protected by the Due Process Clause of the Fourteenth Amendment may arise from two sources -- "the Due Process Clause itself and the laws of the States". Hewitt v. Helms, 459 U.S. 460, 466 (1983). The Court of Appeals found that the Respondent had a liberty interest in remaining on the Program which arose from the Due Process Clause itself. Although the Court of Appeals did not discuss whether such an interest also arose from the laws of the State of Oklahoma, the Petitioner will address both ways in which a liberty interest may be created. The Respondent did not obtain a liberty interest in continued participation in the Program from either source.

A. DUE PROCESS CLAUSE.

1. Nature of the Interest. In Meachum v. Fano, 427 U.S. 215, 224 (1976), this Court stated that upon receiving a valid conviction, an inmate is constitutionally deprived of his liberty to the extent that the State

may confine him and subject him to rules of its prisons, so long as the conditions of confinement do not violate the Constitution. In Meachum v. Fano, this court found that the transfer of an inmate from one institution to another was not protected by the Due Process Clause itself. Likewise, in the instant matter, the transfer of the Respondent from the Program to a more secure facility is not protected by the Due Process Clause.

In 1994, state prisons housed 841,113 prisoners while federal prisons held 94,827 prisoners. All state and federal correctional facilities, however, were designed to hold only 769,928 prisoners.[6] Clearly, our prison system is in a state of crisis.

The Pre-Parole Conditional Supervision Program was enacted by the Legislature of the State of Oklahoma as a program to assist in alleviating the problem of overcrowding within the prison system of the State. See Okla. Stat. tit. 57, § 365 (Supp. 1990). Many states have enacted similar programs as a solution to this widespread, nationwide crisis of prison overcrowding.[7]

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[6]Bureau of Justice Statistics, U.S. Department of Justice, 1994 Sourcebook of Criminal Justice Statistics 537 (Kathleen Maguire and Ann L. Pastore eds., 1995). Petitioner notes that the states of Arizona, Georgia, Maine and Nevada are not reflected in these statistics.

[7] Alabama: Ala. Code § 14-8-110, et seq. (1995).
Arizona: Ariz. Rev. Stat. Ann. § 41-1604.13 (Supp.1995).
Delaware: Del. Code Ann. tit. 11, § 6539 (1995).
Illinois: Ill. Ann. Stat. ch. 730, para. 1005-8A-3 (1995).
Maryland: Md. Code Ann., Crim. Law § 689A (1992).
Michigan: Mich. Comp. Laws § 791.265(h) (Supp.1996).
Mississippi: Miss. Code Ann. § 47-5-1003 (Supp.1996).
(continued...)

These programs are essential to solve the dilemma of overcrowding.

The Program, which is supervised by the DOC, allows an inmate to reside outside a correctional facility. The inmate, however, remains within the custody of the DOC and is treated just as any other inmate remaining behind four institutional walls. An inmate on the Program has not "been released from prison based on an evaluation that he shows reasonable promise of being able to return to society and function as a responsible, self-reliant person". Morrissey v. Brewer, 408 U.S. at 482.[8] The inmate is placed on the Program due to overcrowding in the prison system. Okla. Stat. tit. 57, § 365 (Supp. 1990).[9]

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[7](...continued)
Missouri: Mo. Ann. Stat. § 217.541 (1995).
Nevada: Nev. Rev. Stat. § 209.392 (1995).
Vermont: Vt. Stat. Ann. tit. 28, § 808 (1995).
Wisconsin: Wis. Stat. Ann. § 301.048 (1995).

[8]In fact, in the present matter, the Respondent was removed from the Program because he did not meet such criteria.

[9]The Program can be analogized to a furlough program wherein an inmate is permitted to leave a facility for a limited period of time. Likewise, on the Program an inmate is transferred for a limited time for the purpose of overcrowding. Once the purpose of the Program is eliminated, the inmate may be transferred to a facility as his placement in the Program will no longer serve the purpose for which it is intended. Courts have consistently held that inmates have no liberty interest in continued participation in furlough programs. See Bowser v. Vose, 968 F.2d 105 (1st Cir. 1992); Smith v. Saxbe, 562 F.2d 729 (D.C.Cir.1977).

The Court of Appeals held that the Respondent had a liberty interest in continued participation in the Program which arose from the Due Process Clause itself. The basis of this finding was the determination by the Court of Appeals that the Program was more similar to parole than to a minimum security facility. This finding was erroneous.

In discussing the meaning of "liberty" as set forth in the Due Process Clause, this Court in Board of Regents of State Colleges v. Roth, 408 U.S. 564, 572 (1972) stated:

> "While this Court has not attempted to define with exactness the liberty ... guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized ... as essential to the orderly pursuit of happiness by free men."

Id. (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)). The interest of an inmate on a Program which allows for an inmate's transfer upon denial of parole is not a liberty interest protected by the Due Process Clause itself.

The Program is not the equivalent of parole. Although an inmate on the Program, like a parolee, is allowed to reside in his

own home and work outside the correctional facility, an inmate on the Program does not possess the same "liberty" as a parolee.[10]

An inmate on the Program remains within the custody and control of the DOC. An inmate on the Program is subject to disciplinary proceedings pursuant to DOC guidelines for any violation of a rule. Finally, such an inmate is considered an escapee if he fails to report as required. See Okla. Stat. tit. 57, § 365 (Supp. 1990). The only difference between an inmate behind four walls and an inmate on the Program is the security level classification.

In Morrissey v. Brewer, 408 U.S. 471 (1972), this Court held that when an inmate is placed on parole he or she obtains a liberty interest which is valuable and must be protected by the Fourteenth Amendment. This Court recognized that while a parolee is subjected to many restrictions, his condition is very different from that of confinement in a prison. Together with the ability to reside at home, this Court recognized that a parolee relies on an implicit promise that parole will be revoked only if he violates a condition of parole. Accordingly, this Court held:

> ...the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a "grievous loss" on the parolee and often on others.

Morrissey v. Brewer, 408 U.S. at 482.

---

[10]The many differences between parole and the Program include, but are not limited to: (1) a parolee can leave the state while an inmate on the Program cannot; and (2) a parolee may be unsupervised after three years on parole while an inmate on the Program must remain supervised at all times. See Okla. Stat. tit. 57, § 347 (1991); Okla. Stat. tit. 57, § 512 (Supp.1993).

In Meachum v. Fano, 427 U.S. at 224, this Court rejected the notion that any "grievous loss" invokes the protection of the Due Process Clause. This Court explicitly held that the determining factor is the nature of the interest involved rather than its weight. Id. See also Sandin v. Conner, 132 L.Ed.2d at 428.

The interest involved in the present matter is a degree of confinement, albeit constructive, in which an inmate may be placed if he or she meets certain requirements. Okla. Stat. tit. 57, § 365 (Supp. 1990). Likewise, an inmate may be transferred to a higher degree of confinement at the discretion of the DOC for any reason. As stated above, this Court has held that an inmate holds no liberty interest under the Due Process Clause in his or her placement or degree of confinement. Meachum v. Fano, 427 U.S. at 224. Likewise, whatever deprivation an inmate on the Program experiences by virtue of a change in the degree of confinement and resultant classification to a more supervised prison environment does not encroach on any liberty interest.

The nature of the interest is very different from that of a parolee. In Morrissey v. Brewer, this Court held that an inmate is released to parole after an evaluation that he can return to society and function as a responsible person. In addition, this Court found that a parolee relies on an implicit promise that parole will be revoked only if he violates a condition of parole. Morrissey v. Brewer, 408 U.S. at 482. An inmate on the Program is not placed on the Program after a finding that he will function well in society. Instead, the inmate is placed on the Program, at the discretion on the DOC and pursuant to the need of the State to manage its prison population. Furthermore, an inmate on the Program is not given a promise that he will be transferred only if he violates a condition of the Program. Instead, an inmate on the Program is aware that he may be reclassified to a higher security level for any reason, including (1)

the Governor has denied the inmate parole; (2) the inmate no longer meets the eligibility requirements of continued placement;[11] or (3) the inmate violates a rule or condition of the Program. Jt. App. at 4, 5 and 9.

An inmate on the Program has only a unilateral expectation or hope that he will remain on the Program. As this Court stated in Meachum v. Fano, 427 U.S. at 428:

> Whatever expectation the prisoner may have in remaining at a particular prison so long as he behaves himself, it is too ephemeral and insubstantial to trigger procedural due process protections as long as prison officials have discretion to transfer him for whatever reason or for no reason at all.

An inmate on the Program is clearly aware that he is within the custody and confines of the DOC.[12] Although there are no fences or bars, inmates on the Program do not enjoy **total release** from institutional life as they remain within the disciplinary and procedural confines of the DOC.

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[11]This may be through failure to obtain employment, denial of parole or any other reason at the discretion of the DOC. See Jt. App. at 7-9.

[12]The inmate continues to receive earned credits while on the Program. In addition, the inmate is aware that if he violates any rule or condition of the Program, he will be subject to the disciplinary proceedings of the DOC. Furthermore, the inmate is aware that if he should fail to report as required, he will be considered an escapee and will be subject to prosecution pursuant to Okla. Stat. tit. 21, § 443 (1991). See Okla. Stat. tit. 57, § 365 (Supp. 1990).

While an inmate on the Program may enjoy some of the same freedoms as a parolee, he does not enjoy the freedom of knowing he will remain on the Program unless he violates a rule or condition of the Program. An inmate on the Program is aware that he may be transferred to a higher security level if the Governor, through his discretionary power, denies parole.[13] In addition, an inmate on the Program knows that he can be transferred to a higher security level if the DOC determines, through their discretionary power, that he can no longer participate in the Program for any reason or for no reason. Jt. App. at 4-6.[14] Just as in Meachum v. Fano, 427 U.S. at 228, the DOC has the discretion to transfer an inmate on the Program for any number of reasons, not just for misconduct. Accordingly, the nature of the interest of an inmate on the Program is more similar to an inmate in a minimum security prison rather than an inmate on parole.

In United States v. Taylor, 47 F.3d 508 (2d Cir. 1995), the United States Court of Appeals, Second Circuit held that the Connecticut Supervised Home Release program is a type of confinement. The Connecticut program is strikingly similar to the subject Program. Like the Program, inmates on the Connecticut

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[13]At the time the Respondent was placed on the Program, he was advised of the options available should parole be denied. Shortly after the Respondent was transferred to a higher security status, policy was written that in the event parole was denied by the Governor, the inmate would remain on the Program and within ninety (90) days a review would be held to determine whether the Parole Board desired to allow the inmate to continue participation in the Program. Pet. App. at 53a to 59a. Whether to transfer an inmate from the Program remains within the discretion of the Department of Corrections.

[14]Again, such determination may be based on program failure through inability to find employment or remain in an educational program.

program are allowed to live in their own homes. Such inmates are subject only to standard conditions. In addition, just like the subject Program, an inmate on the Connecticut program who fails to report as required can be found guilty of the crime of Escape.

The Connecticut Supreme Court concluded that an inmate on the program more closely resembled a person confined in a minimum security prison. The Court relied on two factors in making this determination:

> (1) authority over the prisoner remains vested in the Department of Correction, rather than the Board of Parole, just as with any other prisoner serving a prison sentence; and (2) absconding from SHR [Supervised Home Release] constitutes a new crime of escape, whereas a parolee only faces revocation of parole.

Taylor, 47 F.3d at 510. The United States Court of Appeals, Second Circuit agreed with the conclusion of the state court and concluded that the program was a type of confinement. Likewise, the subject Program is merely a degree of confinement. Thus, pursuant to Meachum v. Fano, an inmate in the Program has no liberty interest protected by the Due Process Clause of the Fourteenth Amendment.[15]

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[15]The Court of Appeals adopted the reasoning in Edwards v. Lockhart, 908 F.2d 299 (8th Cir. 1990), to support their finding. In Edwards, the evidence revealed that the work/study release program and parole were generally the same. Based upon this evidence and the fact that Edwards had been released from institutional life altogether, the Court found Edwards had a liberty interest in remaining in such program. As shown above, the Program is distinctly different from the program in Edwards. An

(continued...)

The Court of Appeals appeared to base its decision solely on the fact that an inmate on the Program was not "confined" behind four institutional walls. Following the position of the Court of Appeals, an inmate placed on an electronic home monitoring program ("EHM") would have the same liberty interest as a parolee. Such a finding would be absurd. Although, an inmate on EHM lives outside four institutional walls, his liberty is severly restricted by the Program. The Court of Appeals, however, draws no distinction between an inmate with few restrictions, such as a parolee and an inmate with considerable restrictions, such as an inmate on the Program or EHM. As stated in Morrissey v. Brewer and Meachum v. Fano, this Court must look at the nature of the interest. In reviewing the nature of the interest, it is apparent that the Respondent does not have a liberty interest in remaining at this degree or classification of confinement.

2. A Morrissey hearing is inappropriate. The Court of Appeals concluded that a hearing pursuant to Morrissey v. Brewer must be provided prior to an inmate being transferred to a higher security facility. A Morrissey hearing would not be appropriate when an inmate is removed due to denial of parole as there is no "claimed violation".

In Morrissey v. Brewer, this Court discussed the two steps in a revocation decision. The first step was to determine whether the parolee had in fact violated a condition of parole. Thus, the first step involved a "wholly retrospective factual question". Morrissey v. Brewer, 408 U.S. at 479. Only if a determination

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[15](...continued)
inmate on the Program remains in the custody of the DOC and is not totally released from institutional life. An inmate on the Program does not enjoy all of the freedoms of a parolee.

was made that the parolee had in fact violated a condition of confinement did the second step come into play.

The second step involved a determination of whether the parolee should be recommitted to prison. This second step is not purely factual, but is also predictive and discretionary. Id, 408 U.S. at 480.

This Court discussed the necessity of the procedures set forth in Morrissey v. Brewer to "assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior". Id, 408 U.S. at 484. Thus, the true significance of a Morrissey hearing is to make the factual findings required to progress to step two -- has the parolee violated his conditions of parole.

When an inmate of the Program is denied parole, there is no factual question. Such "verified facts" and "accurate knowledge of the parolee's behavior" are not necessary in making the decision of whether to transfer an inmate to a higher level of security. The only question is whether the inmate should be transferred. Such a determination is purely predictive and discretionary. Such a decision would not be assisted by any type of adversary proceeding. As this Court stated in Meachum v. Fano, 427 U.S. at 225:

> Transfers between institutions, for example, are made for a variety of reasons and often involve no more than informed predictions as to what would best serve institutional security or the safety and welfare of the inmate.

The transfer of an inmate from the Program to a more secure facility, when based upon the denial of parole, is purely discretionary; thus, a Morrissey hearing is not appropriate.[16]

Likewise, when an inmate on the Program violates a rule or condition of the Program, a Morrissey hearing is not required. Instead, the inmate is subjected to a disciplinary hearing pursuant to Wolff v. McDonnell, 418 U.S. 539 (1974).[17] Thus, an inmate who is accused of violating a rule or condition of the Program is given an appropriate hearing to ensure that a determination of the proper disciplinary action will be based upon true and correct factual findings.[18] Just like an inmate confined in an institution, the protections afforded an inmate on the Program for violation of a rule or condition of the Program, pursuant to the DOC disciplinary procedures are sufficient to protect any interest of an inmate placed on the Program.

An inmate on the program is treated just as if he were confined within the four walls of a facility. The inmate is subject to disciplinary proceedings of the DOC if a violation occurs and he will be considered an escapee if he fails to report as required. Okla. Stat. tit. 57, § 365 (Supp. 1990). The inmate is aware that

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[16]Just as in Meachum v. Fano, the DOC has the discretion to transfer prisoners for any number of reasons. Okla. Stat. tit. 57, § 510 (1991).

[17]Such a hearing is mandated pursuant to Okla. Stat. tit. 57, § 365 (Supp. 1990).

[18]When an inmate is transferred from the Program to a facility this is a result of a classification review, rather than a form of discipline. Just as the prison officials in Massachusetts as discussed in Meachum, Oklahoma prison officials can transfer an inmate for any reason. See Okla. Stat. tit. 57, § 510(9) (1991).

he remains in the custody and control of the DOC and can be reclassified to a higher level of security if deemed necessary by the DOC. Jt. App. at 10-12. Accordingly, the nature of the interest is the same as an inmate confined within a facility rather than a parolee. The inmate does not have a liberty interest in continued placement in the Program protected by the Due Process Clause of the Fourteenth Amendment.

This Court has continually held:

> "[a]s long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight."

Kentucky Department of Corrections v. Thompson, 490 U.S. 454, 460-461 (1989) (quoting Montanye v. Haymes, 427 U.S. 236, 242 (1976)). See also Hewitt v. Helms, 459 U.S. at 468; Vitek v. Jones, 445 U.S. 480, 493 (1980). The transfer of an inmate from the Program to a higher security level upon denial of parole or even upon violation of a rule is within the terms of confinement contemplated by a prison sentence. Hewitt v. Helms, 459 U.S. at 468. Thus, such transfer is not protected by the Due Process Clause itself.

B. STATE-CREATED LIBERTY INTEREST

Liberty interests can be created by a state through statutes, regulations or in the practices of state or county officials,[19] which specifically guarantee certain rights not protected by the Due Process Clause of the Fourteenth Amendment itself. Once a state has provided certain rights, the Due Process Clause must insure that those state-created rights are not arbitrarily abrogated. Wolff v. McDonnell, 418 U.S. at 557. States have a choice in whether to create rights not already guaranteed by the Constitution and it is only when they choose to do so that the Due Process Clause will insure protection of such rights.

This Court dealt with state-created liberty interests in Wolff v. McDonnell where it held that state statutes can create liberty interests that do not normally exist for a prisoner under the Fourteenth Amendment's Due Process Clause. Id. In Wolff v. McDonnell, the Nebraska prison officials took away prisoners' good time credits before holding a hearing to determine whether the prisoners' actions constituted flagrant or serious misconduct. Id. Based on Neb. Rev. Stat. § 83-185 (Cum.Supp.1972) and testimony from the prison warden concerning the prison procedures which were in effect at the time these good time credits were taken away, this Court found it clear that Nebraska law provided that deprivation of good time credits could occur only after a hearing with the Adjustment Committee where the misconduct was found to be serious or flagrant. Id. at 548-553. Because the applicable state law in their case stipulated that good time credits could only be taken away for one specific reason (flagrant or serious misconduct), and only after an appropriate hearing, the state had created a protected liberty interest in not taking away good time credits for other reasons or without the

[19]See Vitek v. Jones, 445 U.S. at 489-490.

appropriate hearing. This Court also examined the nature of the liberty interest and found that the state had created a right to a shortened prison sentence, thus, the prisoner's interest had "real substance," entitling protection under the Fourteenth Amendment's Due Process Clause. Id. at 557.

This Court more thoroughly addressed the issue of state-created liberty interests in Meachum v. Fano, 427 U.S. 215 (1976). There, prisoners were claiming they had a protected liberty interest in not being transferred from a medium security facility to a maximum security facility. The prisoners alleged this liberty interest had been violated when they were transferred without a hearing. Unlike Wolff v. McDonnell, however, there was no state law or statute stipulating that transfers could only take place for certain reasons. Since there was no state statute which stripped the discretionary powers of prison officials in this area this Court held that no liberty interests had been created by the state . Meachum v. Fano, 427 U.S. at 228-229. This Court held that prison officials have broad discretion when overseeing the administration of their prisons, unless the state had specifically taken away their discretion in a particular area. Id. This Court stated:

> Holding that arrangements like this are within reach of the procedural protections of the Due Process Clause would place the Clause astride the day-to-day functioning of state prisons and involve the judiciary in issues and discretionary decisions that are not the business of federal judges.

Id.

Finally, in the recent case of Sandin v. Conner, 515 U.S. __, 132 L.Ed.2d 418 (1995), this Court stated it was time to return to the due process principles which were correctly

established in Wolff v. McDonnell and Meachum v. Fano with regard to state created liberty interests. Sandin v. Conner, 132 L.Ed.2d at 428. This Court recognized that states may create liberty interests under certain circumstances. Id. 132 L.Ed.2d at 429. This Court explained:

> [T]hese interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, (Citations omitted), nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.

Id. 132 L.Ed.2d at 430.

In the present case, as previously stated, an inmate in the Program knows that he has simply been transferred to a lower security level within the confinement and custody of the DOC. Jt. App. at 4-6. Additionally, he is aware that should he remove himself from consideration of parole, he will be transferred to a higher security level. Jt. App. at 9. An inmate on the Program is also aware that if he is not employed within thirty days of placement on such Program, he will be transferred to a higher security level. Jt. App. at 6. Most significantly, an inmate in the Program is treated as any other inmate in the confinement and custody of the DOC. He is still able to earn credits which help reduce his term of incarceration, he is subject to disciplinary proceedings, and he will be considered an escapee for failure to report as required. Okla. Stat. tit. 57, § 365 (Supp. 1990). A transfer to a higher security level is an action within the contemplation of the ordinary incidents of prison life for an inmate on the Program. The transfer does not affect the duration of an inmate's sentence in any way. Thus, transferring an inmate to a

higher security level within the custody of the DOC when their parole has been revoked by the Governor cannot be considered an atypical and significant hardship within the ordinary incidents of prison life.

This Court in Wolff v. McDonnell found that the state had created a liberty interest in not taking away good time credits without a proper hearing. Wolff v. McDonnell, 418 U.S. at 548. The nature of this state-created interest was found to be substantial since good time credits resulted in a reduced prison sentence. Id. 418 U.S. at 557. Because the nature of the state created interest was so substantial, this Court held that the Due Process Clause must insure that, "the state-created right is not arbitrarily abrogated." Id. More recently, this Court in Sandin v. Conner, when examining the nature of the state-created liberty interest, looked to whether the state-created right presented an atypical and significant hardship on the prisoner within the ordinary incidents of prison in determining whether the nature was substantial. Sandin v. Conner, 132 L.Ed.2d at 430. Since solitary confinement was within the ordinary confines of the inmate's sentence, and since the solitary confinement did not affect the duration of the inmate's sentence, this Court held that solitary confinement did not present the inmate with an atypical and significant hardship. Id. This Court has also noted that inmates may have unilateral hopes with regard to their prison sentences, such as the hope that their sentence will be commuted, or the hope that they will not be transferred. Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 465 (1981). This Court held, however, that these unilateral hopes cannot be considered substantial in nature. Id. See also Sandin v. Conner, 132 L.Ed.2d at 431 n. 9.

Clearly, in the present case, an interest in not being transferred to a higher level of security is not so substantial in nature as to require protection under the Due Process Clause.

Although transferring an inmate to a higher security status may be a deprivation, confinement within four walls of an institution is an ordinary incident of prison life.[20] Just as in Sandin v. Conner, the inmate in the present matter, was aware that a transfer to a higher security level was within the ordinary confines of his sentence, and further, the transfer in no way affected the duration of his sentence. Moreover, the inmate in the present case simply had a unilateral hope in not being transferred to a higher level of security since transfers are wholly within the discretion of the DOC. Therefore, the nature of this interest cannot be considered substantial, and is not protected under the Due Process Clause.

Further, the State of Oklahoma has no law stating that only if certain conditions are met, can an inmate in the Program be transferred to a higher level of security, unlike Wolff v. McDonnell where the state law mandated that good time credits could not be taken away unless a proper hearing was held and serious or flagrant misconduct found. In Meachum v. Fano, there was no state law which addressed when a prisoner could be transferred to a higher level of security. Likewise, in the present matter there is no state law or DOC regulation which addresses when a particular prisoner can be or must be transferred from the Program to a higher security level.

It is important to examine all of the applicable law in Oklahoma governing an inmate in the Program. A significant characteristic of an inmate in the Program is that he is treated as an inmate housed within an institution. A prisoner in the Program is in a lower security level, but still retains his inmate status. Having a participant of the Program retain their inmate status was

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[20]See Dominique v. Weld, 73 F.3d 1156, 1159-1160 (1st Cir. 1996) (Appellant did not have a state-created liberty interest in work release program).

the clear intention of the Oklahoma Legislature as evidenced by Okla. Stat. tit. 57, § 365 (Supp. 1990), which governs the Program. This statute says in pertinent part:

> E. Should an inmate violate any rule or condition during the period of community supervision, the inmate shall be subject to disciplinary proceedings as established by the Department of Corrections.
>
> F. Any inmate who escapes from this program shall be subject to the provisions of Section 443 of Title 21 of the Oklahoma Statutes.

These are the same procedures and consequences that an inmate in a higher level of security would be subject.

Since an inmate in the Program retains his inmate status in full and is regarded by the DOC as any other inmate, then the issue here becomes whether an inmate in the State of Oklahoma has a liberty interest in not being transferred without a hearing or a specific finding. This issue was clearly decided by Meachum v. Fano when this Court stated,

> Here, Massachusetts law conferred no right on the prisoner to remain in the prison to which he was initially assigned, defeasible only upon proof of specific acts of misconduct.
>
> . . . .
>
> Whatever expectation the prisoner may have in remaining at a particular prison so long as he behaves himself, it is too ephemeral and insubstantial to trigger procedural due process protections as long as prison officials have

> discretion to transfer him for whatever reason or for no reason at all.

Meachum v. Fano, 427 U.S. at 226-228.

Just as with Massachusetts law, Oklahoma law confers no right on the prisoner to remain in the prison system to which he was assigned. Okla. Stat. tit. 57, § 365 (Supp. 1990) is silent as to when an inmate in the Program can be transferred to a higher level of security. Therefore, it is apparent that the DOC's decision to transfer a prisoner to a higher level of security is to remain within the DOC's discretion. This is consistent with Okla.Stat. tit. 57, § 510(9) (1991), which states that transferring prisoners is within the Director of Correction's discretion and powers. This statute has been upheld by both state and federal courts and has been interpreted at both levels as giving the DOC total discretion with respect to prison transfers. See Twyman v. Crisp, 584 F.2d 352 (10th Cir. 1978); Gettings v. Page, 442 P.2d 534 (Okla.Crim.App.1968). Thus, the transfer of an inmate in the Program to a higher security level is completely within the discretion of the DOC, and an inmate in the Program retains no liberty interest in remaining at the lower security level.

The transfer of Respondent from the Program to a higher security classification was purely a discretionary matter and did not impose an "atypical and significant hardship ... in relation to the ordinary incidents of prison life." Sandin v. Conner, 132 L.Ed.2d at 430. Thus, the State of Oklahoma did not create a liberty interest in continued placement in the Program that would entitle the Respondent to any procedural protections.

CONCLUSION

The Program establishes a level of security consistent with an inmate's sentence. Participation in the Program does not create a liberty interest sufficient to trigger the procedural protections of the Due Process Clause. The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1996

LEROY L. YOUNG AND
ATTORNEY GENERAL OF OKLAHOMA,

Petitioners,

v.

ERNEST EUGENE HARPER,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Tenth Circuit

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the Court lacks jurisdiction in this case because the State's petition for rehearing in the Court of Appeals was untimely, and therefore did not toll the statutory 90-day period for filing a petition for writ of certiorari?[1]

2. Whether, consistent with the Due Process Clause and *Morrissey v. Brewer*, 408 U.S. 471 (1972), a State may return to prison without a hearing, "for any reason or no reason," a person who was conditionally released to the community in a program that, under *Morrissey*, differs from parole in name only, and who, the State concedes, abided by all the conditions of his release?

---

[1] Mr. Harper, who appeared *pro se* until the appointment of undersigned counsel after this Court granted certiorari, did not argue the jurisdictional issue in his Brief in Opposition to Petition for Writ of Certiorari. Mr. Harper did point out that the petitioners had "filed an untimely petition for rehearing" in the Court of Appeals, and that the clerk of the court had entered an order granting Petitioners leave to file a "late" petition. Opp'n to Cert. at 6. Jurisdictional objections, in any event, should not be deemed waived even though not raised in the opposition to certiorari. *See* Sup. Ct. R. 15.2, 15.4.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES vi

STATEMENT OF THE CASE 1

1. Statement of the Facts 1

2. Proceedings in the Lower Courts 9

SUMMARY OF THE ARGUMENT 17

ARGUMENT 19

I. THE COURT LACKS JURISDICTION IN THIS CASE SINCE THE STATE'S PETITION FOR REHEARING WAS UNTIMELY AND DID NOT TOLL THE 90-DAY PERIOD FOR SEEKING CERTIORARI 19

A. The Ninety Day Period for Filing is Jurisdictional and Is Not Tolled By an Untimely Petition for Rehearing . . . 19

B. The State's Petition for Rehearing Was Untimely, the Circuit Court Denied It, and Accordingly the 90-Day Period for Seeking Certiorari Was Not Tolled 22

II. THE STATE VIOLATED HARPER'S RIGHT TO DUE PROCESS WHEN IT REINCARCERATED HIM WITHOUT A HEARING . . . 26

A. "Preparole" Is a Parole Program, and Gives Rise to a Fundamental Liberty Interest Under the Due Process Clause 26

B. The State's Newly-Asserted Claim That It May Revoke Preparole "For Any Reason or No Reason" Is Unsupported By the Record and Is Incompatible With Substantive Due Process 38

C. A Morrissey-Style Hearing is Required . 42

1. The Private Interest 43

2. The Value of a Hearing 44

3. The State's Interest 47

CONCLUSION 49

TABLE OF AUTHORITIES

Cases

Barnett v. Moon, 852 P.2d 161 (Okla. Crim. App. 1993) 12

Bearden v. Georgia, 461 U.S. 660 (1983) 39

Black v. Romano, 471 U.S. 606 (1985) 39, 46

Bowman v. Loperena, 311 U.S. 262 (1940) 23

Bowser v. Vose, 968 F.2d 105 (1st Cir. 1992) . . . 35, 36

Cheng Fan Kwok v. I.N.S., 392 U.S. 206 (1968) . . . 20

Chin Gum v. United States, 150 F.2d 765 (1st Cir. 1945) 23

Cruzan v. Director, Missouri Dep't of Health, 110 S.Ct. 2841 (1990) 34

Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor v. Hileman, 897 F.2d 1277 (4th Cir. 1990) 23

Douglas v. Buder, 412 U.S. 430 (1973) 39

Federal Election Comm'n v. NRA Political Victory Fund, 115 S.Ct. 537 (1994) 20

Federal Power Comm'n v. Idaho Power Co., 344 U.S. 17 (1952) 23

Federal Trade Comm'n v. Minneapolis-Honeywell Regulator Co., 344 U.S. 206 (1952) 23, 26

Foucha v. Louisiana, 504 U.S. 71 (1992) 34

Gagnon v. Scarpelli, 411 U.S. 778 (1973) . . . 28, 43, 46

Greenholtz v. Inmates of Neb. Penal & Correctional Complex, 442 U.S. 1 (1979) 28

Harper v. Young, 64 F.3d 563 (10th Cir. 1995) 15

Harper v. Young, 852 P.2d 164 (Okla. Crim. App. 1993) 11, 12, 13

Mathews v. Eldridge, 424 U.S. 319 (1976) 42

Meachum v. Fano, 427 U.S. 215 (1976) 27

Missouri v. Jenkins, 495 U.S. 33 (1990) . . 18, 20, 22, 25

Morrissey v. Brewer, 408 U.S. 471 (1972) . . . . . *passim*

Pfister v. Northern Illinois Finance Corp., 317 U.S. 144 (1942) . . . . . *passim*

Planned Parenthood v. Casey, 505 U.S. 833 (1992) . . 37

Sandin v. Conner, 115 S.Ct. 2293 (1995) 32, 33

Schall v. Martin, 467 U.S. 253 (1984) 46, 47

Smith v. Saxbe, 562 F.2d 729 (D.C. Cir. 1977) . . 35, 36

Spurlock v. State of Oklahoma, 720 P.2d 733 (Okla. Crim. App. 1986) 30

Stone v. I.N.S., 115 S.Ct. 1537 (1995) 20

Thornburgh v. Abbott, 490 U.S. 401 (1989) 39, 40

Turner v. Safley, 482 U.S. 78 (1987) 40

United States v. Taylor, 47 F.3d 508 (2d Cir. 1995) . . 36

Washington v. Harper, 494 U.S. 210 (1990) 42

Wayne United Gas Co. v. Owens Illinois Glass Co., 300 U.S. 131 (1937) 23

Wolff v. McDonnell, 418 U.S. 539 (1974) . . . . . *passim*

Statutes and Rules

28 U.S.C. § 2101(c) 19

Okla. Stat. tit. 57, § 347 29

Okla. Stat. tit. 57, § 350 32

Okla. Stat. tit. 57, § 365 . . . . . *passim*

Okla. Stat. tit. 57, § 512 29

Okla. Stat. tit. 57, § 332.7 . . . . . 1, 2, 4, 34

Okla. Stat. tit. 57, § 332.8. . . . . 1, 34

Sup. Ct. R. 15.2 i

Sup. Ct. R. 15.4 i

Fed. R. App. P. 40(a) 20, 21, 22, 24, 25

Fed. R. App. P. 26(b) 20, 21, 22

Tenth Circuit Local Rule 27.4.4 . . . . . 20, 22

Tenth Circuit Local Rule 40.1 25

Procedures

DOC Interim Pre-Parole Conditional Supervision Revocation Procedure OP-060208 . . . . . 9, 11, 14

DOC Policy and Operations Manual Procedure 0P-090104 8

DOC Policy and Operations Manual Procedure 0P-160120 3

Pardon and Parole Board Procedure 004-11 (effective 9/1/89) 4, 8, 11, 14

Pardon and Parole Board Procedure 004-11 (effective 8/8/91) . . . . . *passim*

Pardon and Parole Board Procedure No. 004-11 (effective 4/1/94) 4, 8, 9, 14

Other Authorities

C. Camp & G. Camp, The Corrections Yearbook -- Probation & Parole (1990) 49

C. Camp & G. Camp, The Corrections Yearbook -- Adult Corrections (1995) 49

C. Camp & G. Camp, The Corrections Yearbook -- Probation & Parole (1995) 49

Daily Oklahoman May 29, 1996 4

Orientation for Preparole Conditional Supervision 5

Pardon and Parole Board Brochure (1989) . 2, 3, 8, 30, 45

Pardon and Parole Board Brochure (1992) 3, 8

Parole Fact Sheet (effective 6/91) 3, 5, 29

Rules and Conditions of Pre-Parole Conditional Supervision (effective 9/90) 3, 5, 29, 32

Rules and Conditions of Pre-Parole Conditional Supervision (effective 6/93) 3

STATEMENT OF THE CASE

1. Statement of the Facts

Ernest Eugene Harper has served 21 years of a life sentence. In 1990, the Oklahoma Pardon and Parole Board[1] considered Mr. Harper for release from prison under two separate conditional release programs: parole and "preparole."[2] The Parole Board decided to recommend Mr. Harper under both programs.[3]

Oklahoma's "preparole" program is parole by another name; essentially, it is early parole. A prisoner must serve 30 percent of his sentence to be eligible for parole, only 15 percent to be eligible for preparole; otherwise, the eligibility requirements and criteria are identical. Mr. Harper met *all* criteria for parole eligibility.[4]

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[1] Hereinafter Parole Board.

[2] Preparole Conditional Supervision Program (hereinafter preparole). *See* Okla. Stat. tit. 57, § 365 (1989).

[3] State's Resp. Br. at 1, filed November 10, 1992 (Okla. Crim. App.)(No. H-92-0735); Pet. for Habeas Corpus at 6, filed October 13, 1993 (N.D.Okla.)(No. 93-CV-948).

[4] To be eligible for the preparole program, a prisoner must meet all the criteria for parole eligibility (except for percentage of sentence served), which are set forth in Okla. Stat. tit. 57, §§ 332.7 and 332.8, and must be within one year of his regularly scheduled parole consideration date or his projected release date. *See* Okla. Stat. § 365(A)(2). The Parole Board must "inquire into the conduct and the record" of the person during his custody in the DOC, Okla. Stat. § 332.7(A), and must consider, among other things, the number of previous felony convictions, the type of criminal violations leading to any such criminal convictions, and in every appropriate case monetary restitution to victims. Okla. Stat. § 332.8. Mr. Harper had served 15 years of his sentence at the time the Board

The purposes of the two programs overlap. The purposes of preparole are to reduce prison overcrowding[5] and to "reintegrate the prisoner in society;"[6] the purposes of parole are "to alleviate the costs to society of keeping an individual in prison" and "to help individuals reintegrate into society as constructive individuals as soon as they are able."[7] Like a parolee, a preparolee reports periodically to a parole officer for supervision in the community,[8] and has no contact with prison officials unless he is returned to prison.[9] Like a

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recommended him for parole. Under Oklahoma law, this is considered one-third of a life sentence for purposes of parole eligibility. Resp't App. A at 3a, Parole Board Brochure (1989).

[5] Okla. Stat. § 365 provides that whenever the population of the prison system exceeds 95% of capacity, the Department of Corrections (hereinafter DOC) and the Parole Board shall implement the preparole program until such time as the population is reduced to 92 1/2% of capacity, for persons in the custody of the DOC who meet certain guidelines. The parole statute provides that parole may also be used as a device to reduce overcrowding, in certain specified cases. *See* Okla. Stat. tit. 57, § 332.7(B).

[6] State's Resp. Br. at 3, filed November 10, 1992 (Okla. Crim. App.) (No. H-92-0735); State's Resp. Br. at 5, filed December 6, 1993 (N.D. Okla.) (No. 93-CV-948); State's Opp'n Br. at 7 n.2. filed April 5, 1995 (9th Cir.)(No. 95-5026).

[7] *See Morrissey v. Brewer*, 408 U.S. 471, 477 (1972). The Oklahoma statutes do not recite the purposes of either parole or preparole.

[8] Parole officers supervise both parolees and preparolees. Appendix A to Respondent's Brief (hereinafter Resp't App.) at 7a, 9a, Oklahoma Parole and Pardon Board Brochure, 1989 (hereinafter Parole Board Brochure).

[9] *See* Opp'n to Resp. to Pet. for Habeas Corpus at 6, filed December 13, 1993.

parolee, he can be removed from the program and returned to prison if he does not comply with the conditions of his release.[10]

The standard conditions of release are nearly identical in the two programs.[11] Consequently, when the State of Oklahoma releases a prisoner on preparole, it conditionally restores to him essentially the same freedoms of association, autonomy, independence, dignity, and bodily privacy enjoyed by parolees. Like parolees, preparolees are free from surveillance by prison guards, and free from the prison rules and regulations which circumscribe the details of a prisoner's daily existence. They are free to wear what they choose, to eat what they choose, to rise, go to bed, and turn out the light when they choose; they are free to guard their bodily privacy; they are free to consult with a doctor whenever they see fit; subject to the conditions of their release, they are free to associate and correspond with whomever they choose, to recreate and socialize as they wish, to spend time alone with family and loved ones; to earn a living at whatever honest employment their skills and experience fit them for, at

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[10] Resp't App. A at 9a, Parole Board Brochure (1989); Resp't App. B at 22a, Parole Board Brochure (1992).

[11] *Compare* Resp't App. C, Parole Fact Sheet, Standard Rules and Conditions *with* J.A. at 7-9, Rules and Conditions of Pre-Parole Conditional Supervision. The only difference between these two sets of rules and conditions is that a parolee cannot leave the state to which he is paroled without written permission, while a preparolee cannot leave the State of Oklahoma under any circumstances. The burdens of this conditional freedom are also similar. For example, as of 1993, parolees and preparolees alike are entirely responsible for their own medical care and medical expenses, "includ[ing] any cost incurred for emergency medical care." *See* Resp't App. E at 35a, DOC Operations Manual Procedure OP160120, and Resp't App. D at 33a-34a, Rules and Conditions of Preparole Conditional Supervision (effective 6/93).

whatever wages their abilities may command; and to spend their wages as they see fit. In short, exactly like parole, preparole contemplates nothing less than the offender's reintegration into society.

The chief difference between the two programs lies in the admission process. Under both programs, the prisoner must be recommended for release by the Parole Board; but in the case of parole that recommendation must be approved by the Governor, and in the case of preparole by the DOC.[12] The Governor has no statutory role in granting or revoking preparole.[13] The programs operate on separate tracks within the statutory framework. Participation in preparole is not necessarily a prerequisite to parole,[14] and parole denial does not disqualify a preparolee from continued participation in the preparole program.[15] In fact, according to a DOC spokesman, "most preparole inmates who are turned down for full parole are allowed to remain out of prison."[16]

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[12] Okla. Stat. §§ 332.7(A), 365. When the DOC rejects a preparole applicant recommended by the Parole Board, an administrative review committee comprised of DOC and Parole Board staff members jointly reviews his suitability for preparole. Appendix F to Petitioner's Petition for Certiorari (hereinafter Pet'r App.) at 45a.

[13] Okla. Stat. § 365; Resp. Br. at 11, 14, filed November 10, 1992 (H-92-0735).

[14] *See* Okla. Stat. § 332.7; *see also* Pet'r App. G at 55a, Pardon and Parole Board Procedure 004-11 ("Inmates who are not recommended by the Board [for preparole] will be considered for parole on the regularly scheduled docket.")

[15] *See* Okla. Stat. § 365; Pet'r App. G at 56a; Resp't App. F at 38a, Parole Board Procedure 004-11 (April 1, 1994).

[16] Resp't App. G at 42a, Daily Oklahoman, May 29, 1996 at 6.

On October 16, 1990, Mr. Harper was released from prison on preparole. The Parole Board's recommendation to the Governor for parole was still pending.

Prior to his release, Mr. Harper and his caseworker executed a form titled "Rules and Conditions of Preparole Conditional Supervision." (J.A. at 7-9). The conditions of release were almost identical to the Standard Rules and Conditions governing Oklahoma parolees.[17] The preparole form also contained the stipulation, "I understand that waiving parole while on pre-parole status will result in reclassification to higher security status."[18] The form did not indicate that parole *denial* would result in any change in status.

After his release, Mr. Harper was required to execute a second form, titled "Orientation for Preparole Conditional Supervision," which states "[t]his orientation is provided to insure that each Offender is aware of the rules, responsibilities, expectations and possible consequences of not meeting these obligations." (J.A. at 4). Following a list of rules and obligations is the stipulation "I [] understand that being classified to community level depends upon my compliance with each of these expectations." (J.A. at 6). The form also included the stipulation, "Reviewed options in the event of parole denial." (J.A. at 5). The form did not provide

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[17] *See* Resp't App. C, Parole Fact Sheet. There is a blank space provided on the preparole form for "special conditions by the Pardon and Parole Board" but there were no special conditions listed in Mr. Harper's case. J.A. at 9, Rules and Conditions of Pre-Parole Conditional Supervision. Special conditions may also be imposed in parole. Resp't App. C, Parole Fact Sheet.

[18] J.A. at 9. The State presented no evidence in the lower courts as to the meaning of this provision.

that Mr. Harper would be returned to prison if the Governor did not approve him for parole.[19]

During the five months that he was in the program, Mr. Harper's existence in the community was virtually identical to that of a parolee. He lived in an apartment in Tulsa for which he paid rent, he was gainfully employed, and he was free to be with his family and friends and to form other attachments of normal life.[20] He had no contact at all with correctional officers, and only periodic meetings with a parole officer for counselling and supervision.[21] The State does not contend that Mr. Harper violated a single rule or condition of

[19] The State has never presented any evidence as to what, if anything, Mr. Harper was actually told about the effect of parole denial, or what the "options" were that are mentioned here. The State has never gone so far as to make the direct claim that Mr. Harper was told preparole could or would be revoked. If an evidentiary hearing had been held, Mr. Harper would have testified that no explanation was ever given to him about the meaning of this stipulation, and that he was given no reason to believe that he would be returned to prison merely because the Governor denied parole.

[20] Br. in Opp'n to Resp. to Pet. for Writ of Habeas Corpus at 6, filed December 13, 1993 (No. 93-CV-948); Pet. for Writ of Habeas Corpus at 6 and addendum, filed October 13, 1993 (No. 93-CV-948). If the case is remanded for further findings, Mr. Harper will present evidence that he worked at a highly responsible job obtained through his own initiative and merits, made his own decisions as to how he would he spend his salary, paid his own bills, socialized, and visited public libraries, movies, parks, church and grocery stores without supervision; that he never had any contact with prison guards or with DOC officials of any kind; and that his only contact with program administrators was a periodic meeting with a parole officer, who monitored his progress and offered counsel and advice.

[21] Opp'n to Response to Pet. for Writ of Habeas Corpus at 6, filed December 13, 1993 (No. 93-CV-948).

preparole, or that he was anything less than a model participant.[22]

On March 14, 1991, after five months at liberty, Mr. Harper's parole officer telephoned him at 5:30 in the morning to inform him that the Governor had not approved him for parole, and that he must report back to prison by ten o'clock.[23] Mr. Harper reported back to prison as directed. He was never granted a hearing, either before or after his return to prison, on whether his preparole status should be revoked.[24]

The Oklahoma statutes do not enumerate grounds for revoking either parole or preparole,[25] and do not provide that parole denial shall affect preparole status. Nor, during the

[22] (Pet'r Br. at 7). If Mr. Harper had been granted a hearing before his preparole status was revoked, as the State's regulations now provide, he would have presented testimony from his parole officer, employer, family, friends, and other members of the community as to his exemplary work record, conduct, and attitude while on preparole.

[23] The State has never offered any evidence and the record is silent as to the identity of the State agency or official who made the decision to return Mr. Harper to prison.

[24] Resp. Brief at 1, filed November 10, 1992 (No. H-92-0735); Pet. for Writ of Habeas Corpus at 6 and addendum, filed October 13, 1993 (No. 93-CV-948); Opp'n to Pet. for Writ of Habeas Corpus at 2, filed December 13, 1993 (No. 93-CV-948).

[25] In 1993, the preparole statute was amended to specify that preparole can be revoked for failure to make satisfactory progress in an educational program in which the inmate has been required to participate as a condition of eligibility in the program. Any such inmate "shall be returned to confinement in the custody of the Department of Corrections." Okla. Stat. §§ 365(A)(3) and (G) (effective as amended 4/29/93).

time Mr. Harper was in the preparole program, did the administrative regulations implementing the program indicate that parole denial could affect participation in the preparole program.[26] However, on August 8, 1991, five months after Mr. Harper was returned to prison, the Parole Board amended its Procedure No. 004-11, to provide that "[i]nmates who are denied [parole] by the Governor shall remain on PPCS [preparole] and shall be reviewed by the Parole Board ninety days from denial to determine whether or not the Parole Board desires to allow the inmate to remain on PPCS."[27] On April 1, 1994, the Parole Board again amended its Procedure No. 004-11, this time to provide that "[i]nmates denied parole by the Governor while on PPCS will remain on the program, unless returned to higher security by due

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[26] Resp't App.H at 43a-50a, Parole Board Procedure 004-11 (effective September 1, 1989); Pet'r App. F at 43a-52a, DOC Procedure 090104 (effective July 4, 1990). The Parole Board's brochures suggest that the only grounds for preparole revocation are failure to comply with the conditions of release, or an election by the preparolee not to be considered for parole:

> The conditions [of preparole] are very similar to parole. If an inmate does not comply with the conditions, he or she can be removed from the program and brought back to prison. Since the program is intended to prepare the inmate for parole supervision, the inmate is removed from the program if he or she elects not to be considered for parole. ... Governor approval is not required for [preparole].

Resp't App. A at 9a, Parole Board Brochure (1989); Resp't App. B at 22a, Parole Board Brochure (1992).

[27] Pet'r App. G at 56a, Pardon and Parole Board Procedure 004-11 (effective August 8, 1991).

process."[28] The State has never provided any kind of revocation hearing to Mr. Harper. He remains in prison.

2. Proceedings in the Lower Courts

Although key issues of fact were disputed in this case in the courts below,[29] Mr. Harper's requests for an evidentiary hearing were denied,[30] as were his requests for appointment of counsel.[31]

Mr. Harper filed a *pro se* Petition for Habeas Corpus in state court, challenging the State's revocation of preparole without affording him due process.[32] The court denied Mr. Harper's petition on the ground that habeas corpus was an

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[28] Resp't App. E, Parole Board Procedure 004-11, as amended April 1, 1994. Furthermore, on October 29, 1992, citing *Morrissey v. Brewer*, 408 U.S. 471 (1972), the DOC promulgated hearing procedures for revoking preparole in conformity with the requirements of *Morrissey*. *See* Resp't App. I, Interim Preparole Conditional Supervision Program Revocation Procedures, OP-060208.

[29] These factual disputes included whether Mr. Harper had notice that he would be removed from the program if parole were denied; to what extent preparole resembles parole, other release programs, or incarceration; and the nature of the State's interest in revoking preparole without a hearing.

[30] *See* Opp'n to Resp. to Pet. for Habeas Corpus at 3, filed December 13, 1993 (No. 93-CV-948).

[31] *See* J.A. at 13-14, Mtn. for Appointment of Counsel, filed June 20, 1994; District Court Order filed June 27, 1994; Appellant's Opening Brief at 9-10, filed February 24, 1995 (No. 95-5026).

[32] Pet. for Writ of Habeas Corpus, dated March 20, 1992 (No. C-92-44).

inappropriate vehicle to challenge the revocation.[33] Mr. Harper then filed *pro se* in the court of criminal appeals.[34] That Court ordered the State to respond, stating:

> When a prisoner is released from incarceration pursuant to a preparole conditional supervision program and lives outside institutional facilities, the due process clause vests this person with a liberty interest in remaining in said program. Therefore, the minimum requirements of *Morrissey* must be observed before this person can be removed from the program for a rule or condition violation. However, the record before this Court reflects that petitioner was not removed from the [preparole] program for a violation of a rule or condition of probation, but that he was removed because he was no longer eligible for the program because the Governor did not sign his out-of-state parole recommendation.
>
> We are, therefore, directing the ... State ... to respond to Petitioner's application, specifically addressing eligibility for the [preparole] program when the Governor does not approve parole after a prisoner has been recommended for parole and placed in the [preparole] program by the ... Parole Board and the Department of Corrections. The response shall also address any due process protections required before a prisoner is removed from the [preparole] program because the Governor does not approve parole.[35]

[33] Journal Entry and Order at 3, filed May 19, 1992 (No. C-92-44).

[34] Application for Extraordinary Writ of Habeas Corpus dated August 10, 1992 (No. H-92-0735).

In its response, the State supplied the court with amended Parole Board Procedure 004-11 (issued five months *after* Mr. Harper was returned to prison) as evidence that "inmates are aware that they will only remain on preparole status so long as they remain otherwise eligible for parole."[36] The State claimed that Mr. Harper was "no longer eligible" for preparole after the governor denied parole.[37]

[35] Order Directing Response at 2, filed September 10, 1992 (No. H-02-0735).

[36] *See* Pet'r App. G at 55a-56a; *Harper v. Young*, 852 P.2d 164, 165 (Okla. Crim. App. 1993). The State did not provide to the court the version of Parole Board Procedure 004-11, in effect in 1990 when Mr. Harper was in the program, which does *not* indicate that parole denial could be a basis for preparole revocation; or with the 1992 DOC hearing procedures for revoking preparole in conformity with the requirements of *Morrissey*. *See* Resp. Br. filed November 10, 1992 (No. H-92-0735); Resp't App. H at 43a, Parole Board Procedure 004-11 (effective September 1, 1989); Resp't App. I at 51a, Interim Preparole Conditional Supervision Program Revocation Procedures, (effective October 29, 1992).

[37] Resp. Br. at 12-13, filed November 10, 1992 (No. H-92-0735). The State also asserted that preparole was similar to house arrest rather than to parole, without supplying any evidence of the nature of either preparole or house arrest. *See id.* at 3. *See also* Resp. Br. at 5 filed December 6, 1993 (No. 93-CV-948); Opp'n Br. at 7 n.2 filed April 5, 1995 (No. 95-5026). In the State's Petition for Rehearing filed in the Tenth Circuit, the State argued that preparole was like minimum security prison confinement, *see* Pet. for Reh'g at 5, filed September 15, 1995 (No. 95-5026), but did not present any evidence about the nature of minimum security confinement in Oklahoma. In this Court, the State argues that preparole is akin to furlough, without presenting any evidence about the nature of Oklahoma's furlough program. (Pet'r Br. at 15 n.9).

The court of criminal appeals thereupon reversed its earlier decision that *Morrissey* applied to preparole revocations. *Harper v. Young*, 852 P.2d 164, 165 (Okla. Crim. App. 1993). The court stated that the issues presented by Mr. Harper were "fully addressed" in a decision it had issued the same day in a companion case, *Barnett v. Moon*, 852 P.2d 161, 162 (Okla. Crim. App. 1993). *Barnett* held that preparolees were not entitled to a revocation hearing under *Morrissey v. Brewer* because the very word "preparole" shows that a person in the program has not been released from prison:

> The prefix "pre" means "in front," "before," or "in advance." . . . Here, it implies a preparatory or preliminary status present before the sought-after status is manifested. Therefore, preparole is by definition not parole, but a preparatory status to parole itself. And since "parole" means release from jail, prison or other confinement after actually serving part of a sentence, . . . logically preparole means before such release.[38]

Barnett, 852 P.2d at 162. Applying *Barnett* to Mr. Harper's case, the court reasoned that since preparolees are, "by definition," already "confined," the "degree of confinement" when they are returned to prison is of no concern to the court, "so long as an administrative procedure affords an appropriate method by which the decision to change the degree of confinement can be justified." *Harper*, 852 P.2d at 165. The court went on to hold that amended Parole Board Procedure

[38] The court ignored the common use of the prefix "pre" to denote something already done, or done early: as in "preview," "prearranged," "preheat," "precook," "prepay," "preset," "predetermined." In this typical usage of the prefix "pre," preparole means "early parole."

004-11 (issued five months *after* Mr. Harper was returned to prison) afforded him both notice and due process, because it:

> gives an inmate sufficient notice when he is placed in the program that he may be removed from it when the governor exercises his discretion and declines to grant parole. The governor's refusal to grant parole does not change the fact that Petitioner is confined and the provisions of *Morrissey* do not apply. The procedures used by the Pardon and Parole Board in determining whether Petitioner should stay in the [preparole] program assure [Harper] he is receiving the process that is due him.

Id. Thus, the court of criminal appeals' decision was based on three findings of fact, not one of which had been tested at an evidentiary hearing, and all of which Mr. Harper contests: (1) that he had been in "confinement" while in the preparole program; (2) that the Parole Board regulation issued after he had been returned to prison had given him notice that he could be removed from the program if parole were denied; and (3) that his case had been reviewed pursuant to the newly-issued regulation.

On October 13, 1993, Mr. Harper filed a *pro se* Petition for Habeas Corpus in Federal District Court.[39] The State asserted that preparole was like the House Arrest Program (without supplying any evidence to permit a comparison) and again asserted that Mr. Harper became ineligible for preparole

[39] He filed a Motion for Appointment of Counsel in the District Court on June 20, 1994, based, *inter alia*, on the complexity of the issues involved in the case, and his limited knowledge of the law. J.A. at 13-14. The motion was denied. District Court Order issued June 27, 1994 (No.93-CV-948).

when the governor denied parole.[40] Without holding an evidentiary hearing, the court denied the writ, on the ground that a prisoner in preparole "has not yet 'been released from prison based on an evaluation that he shows reasonable promise of being able to return to society and function as a responsible, self-reliant person;'" that Mr. Harper "had not been released from institutional life altogether;" and that requiring a due process revocation hearing would undercut the statutory purpose to relieve overcrowding.[41] The district court issued a Certificate of Probable Cause,[42] and Mr. Harper filed an appeal to the Tenth Circuit *pro se* on February 24, 1995.

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[40] Resp. Br. at 5, filed December 6, 1993 (No. 93-CV-948).

[41] District Court Order at 6, 10 and n.4, filed January 10, 1995 (No. 93-CV-948). The court accepted the State's unsupported assertions on these matters. The State did not provide to the court the 1989 version of Parole Board Procedure 004-11, that was in effect when Mr. Harper was in the preparole program. Resp. to Order Dated July 28, 1994, filed August 25, 1994 (No. 93-CV-948). That procedure does *not* indicate that parole denial could lead to revocation from preparole. *See* Resp't App. H at 43a, Parole Board Procedure 004-11 (effective 9/1/89). The State also failed to provide to the District Court the 1994 amendment to Parole Board Procedure 004-11 providing that "inmates denied parole by the Governor while on PPCS will remain on the program, unless returned to higher security by due process;" or the 1992 DOC hearing procedures for revoking preparole in conformity with the requirements of *Morrissey*. *See* Resp't App. F at 38a, Parole Board Procedure 004-11 (effective 4/1/94); Resp't App. I at 51a, Interim Preparole Conditional Supervision Program Revocation Procedures, OP-060208; Resp. to Order dated July 28, 1994 filed August 25, 1994 (No. 93-CV-948). In response to a district court Order to produce the implementing procedures for the Preparole Program, the State incorrectly represented that the 1991 version of Procedure 004-11 was the "first written procedure [by the Parole Board] regarding" preparole. *Id.* at 1 n.1.

[42] Certificate of Probable Cause, filed February 13, 1995 (No. 93-CV-948). *Id.*

On August 30, 1995, the Tenth Circuit reversed the district court's ruling and remanded, directing the lower court to issue the writ of habeas corpus unless Mr. Harper was reinstated to preparole, and ordering the State to provide Mr. Harper with a due process hearing prior to any future revocation. *Harper v. Young*, 64 F.3d 563 (10th Cir. 1995). The court of appeals found that preparole was "sufficiently similar to parole or probation to merit protection by the Due Process Clause itself," in that participants are selected by the Parole Board, are "free to enjoy most of the benefits of a normal existence," and are subject to restrictions similar to those of a parolee. *Id.* at 565. The court also found that "[t]he liberty associated with a life outside the walls of a penal facility dwarfs that available to an inmate," and that

> [t]he passage outside the walls of a prison does not simply alter the degree of confinement; rather, it works a fundamental change in the *kind* of confinement, a transformation that signals the existence of an inherent liberty interest and necessitates the full panoply of procedural protections outlined in *Morrissey*.

Id. at 566 (citation omitted). The court noted that Mr. Harper was revoked from preparole because he was denied parole, but that "nothing in the regulations governing the program mandated that result," and pointed to Procedure 004-11 as evidence that revocation is not mandated. *Id.* at 565.

The State of Oklahoma filed an untimely Petition for Rehearing and Suggestion for Rehearing En Banc, on September 15, 1995, sixteen days after the entry of judgment. On September 25, 1995, the Tenth Circuit entered an order *sua sponte* which "grant[ed] appellees leave to file a late

petition for rehearing and suggestion for rehearing en banc."[43] On February 21, 1996, the court of appeals issued its mandate to the district court,[44] and on February 28 the district court issued its order directing that Mr. Harper be released immediately from prison or reinstated in the program. (J.A. at 15, District Court Order (No. 93-CV-948)). Also on February 28, the court of appeals entered an order (*nunc pro tunc* to February 13, 1996), denying the State's Petition for Rehearing, without any discussion of the merits.[45]

The State filed a motion in the court of appeals, seeking recall of its mandate and a stay, pending application to this Court for certiorari.[46] The Motion to Recall the Mandate and for a Stay was granted. (J.A. at 16, Order filed March 6, 1996 (No. 95-5026)). The State filed a Petition for a Writ of Certiorari on April 4, 1996, within 90 days of the denial of the untimely petition for rehearing, but more than 90 days after the original entry of judgment in the Tenth Circuit on August 30, 1995.

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[43] Order issued September 25, 1995 (No. 95-5026).

[44] Order issued February 21, 1996 (No. 95-5026).

[45] *See* Pet'r App. C at 18a-19a, Order entered February 28, 1996 (No. 95-5026).

[46] The sole reason the State offered for its failure to seek a stay of the mandate until after the mandate had issued was that counsel had received the order denying rehearing on Friday afternoon preceding a long weekend, and that the mandate was due to issue after the holiday; hence "counsel was unable to meet [the] deadline." Br. in Support of Mtn. to Recall Mandate and Application for Stay at 3 n.2., filed February 26, 1996 (No. 95-5026).

SUMMARY OF THE ARGUMENT

Ernest Harper was released from prison after the Oklahoma Parole Board reviewed his case and decided to recommend him for two conditional release programs, parole and "preparole." Preparole is essentially early parole. The eligibility requirements, selection criteria, and conditions of release and are virtually identical in both programs. Admission to both programs is only upon recommendation of the Parole Board. The main difference between the two programs is that for preparole the DOC must approve the Board's recommendation, while for parole the Governor must approve the Board's recommendation. The Governor plays no statutory role in the grant of preparole.

Mr. Harper was released from prison under the preparole program, with the Board's recommendation for parole still pending. While in the community, he conducted himself as a model citizen. Five months after his release, the Governor decided not to approve parole, and the State informed Mr. Harper that he must report back to prison. Mr. Harper did so. The State never granted him any kind of hearing to determine whether his return to prison was warranted.

In the courts below, the State claimed that it returned Mr. Harper to prison because the Governor's denial of parole made Mr. Harper ineligible for preparole under the statute. It transpired that this was incorrect. Oklahoma statutes mandate no such result, and furthermore the Parole Board's implementing regulations provide just the opposite: the agency presumption is that denial of parole shall have no effect on preparole status. The State now offers a new rationale for returning Mr. Harper to prison without a hearing: it claims the authority to return preparolees to prison "for any reason or no reason," and argues that since it has unlimited

discretion to return persons to prison from preparole, fact-finding is unnecessary and a hearing would be pointless.

The Tenth Circuit found that preparole was similar to parole; held that *Morrissey v. Brewer*, 408 U.S. 471 (1972), was applicable; and ordered the State to release Mr. Harper and not return him to prison without a hearing in conformity with *Morrissey*. The State filed an untimely petition for rehearing of this judgment. The Circuit Court accepted the late filing, but denied the State's untimely petition, without reaching the merits. The State then filed for certiorari, more than 90 days after the entry of the Circuit Court's original order.

The 90-day period for filing for certiorari is jurisdictional and not subject to equitable tolling. *See Missouri v. Jenkins*, 495 U.S. 33 (1990). Only timely petitions for rehearing toll the 90-day period for rehearing; an untimely petition has no such effect, unless the court of appeals grants it. *See Pfister v. Northern Illinois Finance Corp.*, 317 U.S. 144 (1942). Here, the Circuit Court denied the State's untimely petition. Therefore, the 90-day period for certiorari commenced with the entry of the Circuit Court's original order, and the State's petition for certiorari was untimely. Accordingly, this Court lacks jurisdiction, and should dismiss the case and remand to the Tenth Circuit. *See infra* Point I.

In the event the Court does not dismiss for lack of jurisdiction, it should affirm the decision of the Tenth Circuit. The difference between parole and the "preparole program" is only one of nomenclature under *Morrissey*. In releasing Mr. Harper from prison, the State restored to him on a conditional basis many of the core values of unqualified liberty, just as it does when it releases a person on parole. Mr. Harper had a liberty interest arising under the Due Process Clause in not being returned to prison arbitrarily, "for

any reason or no reason." A *Morrissey*-style hearing was required to provide sufficient protection against an erroneous, arbitrary and unnecessary deprivation of the freedom the State had conditionally restored to him. Mr. Harper was entitled to an opportunity to show that it would be inappropriate to return him to prison; and the State was obliged to decide on the basis of verified facts and informed discretion whether Mr. Harper was fit to remain at liberty.

ARGUMENT

I. THE COURT LACKS JURISDICTION IN THIS CASE SINCE THE STATE'S PETITION FOR REHEARING WAS UNTIMELY AND DID NOT TOLL THE 90-DAY PERIOD FOR SEEKING CERTIORARI

A. The Ninety Day Period for Filing is Jurisdictional and Is Not Tolled By an Untimely Petition for Rehearing

Congress has limited the Supreme Court's jurisdiction to entertain petitions for certiorari by requiring that the petition must be filed within 90 days after entry of the judgment for which review is sought. 28 U.S.C. § 2101(c).[47] As this Court has stressed:

> This 90-day limit is mandatory and jurisdictional. We have no authority to extend the period for filing except as Congress permits. Unless the State's petition was filed within 90 days of the entry of the

[47] Section 2101(c) provides that a Justice of the Supreme Court, for good cause shown, may extend the time for applying for the writ for a period not exceeding 60 days. The State did not seek an extension in this case, and none was granted.

Court of Appeals' judgment, we must dismiss the petition.

Missouri v. Jenkins, 495 U.S. 33, 45 (1990). *Accord Federal Election Comm'n v. NRA Political Victory Fund*, 115 S. Ct. 537, 539, 543 (1994). Statutory provisions specifying the timing of judicial review "are not subject to equitable tolling." *Stone v. I.N.S.*, 115 S. Ct. 1537, 1549 (1995). *See also Cheng Fan Kwok v. I.N.S.*, 392 U.S. 206, 212 (1968).

A timely petition for rehearing in the court of appeals does extend the time for filing a petition for certiorari, by suspending the finality of the judgment pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the parties' rights. *See Missouri v. Jenkins*, 495 U.S. at 45-46 (citing *Department of Banking of Nebraska v. Pink*, 317 U.S. 264 (1942)). In contrast, an untimely request for rehearing does not extend the period for seeking review. *See Pfister v. Northern Illinois Finance Corp.*, 317 U.S. 144, 150-51 (1942).

Here, the State's petition for rehearing was unquestionably untimely. The court of appeals' judgment was entered August 30, 1995. On September 15, sixteen days after the entry of judgment, without the time for filing having been enlarged by local rule, and without the State having sought or been granted an enlargement of time in which to file for rehearing,[48] the State filed a Petition for Rehearing with Suggestion for Rehearing En Banc. The State's Petition for

[48] The State could have sought an enlargement of time in which to file for rehearing, pursuant to Fed. R. App. P. 40(a) and 26(b), and Tenth Circuit Local Rule 27.4.4.

Rehearing was thus filed two days out of time.[49] Ten days later, the Tenth Circuit entered an order *sua sponte* which "grant[ed] appellees leave to file a *late* petition for rehearing and suggestion for rehearing en banc."[50]

Of course, the courts of appeals have the equitable power, reflected in Rules 40(a) and 26(b), Fed. R. App. P., to enlarge the time for filing a petition for rehearing, and to permit filing even after the time for filing has expired. Had the State timely moved for an enlargement of time in which to file a petition for rehearing, the court could have granted it; and had the State by motion shown "good cause," even *after* the expiration of the deadline for the petition for rehearing, the court could have entered an order under Rule 26(b) enlarging the time after the fact. Had the court of appeals done so, and entered an order accepting the late petition *nunc pro tunc*, the State could now claim that the court had made its untimely petition "timely."

But there is no occasion for the Court to decide whether the courts of appeals can make untimely petitions for rehearing "timely" in a case such as this, by entering an order permitting filing "*nunc pro tunc*;" for that is not what happened here. No such order was entered, because the State did not show good cause, or any cause at all, for the late filing, and did not even ask for an enlargement of time, either before or after the expiration of the deadline for filing.

[49] Rule 40(a) provides that "[a] petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule." Fed. R. App. P. 40(a).

[50] Order filed September 25, 1995 (No. 95-5026) (emphasis added). The Order also provided that "Appellant shall file a response to the petition for rehearing and suggestion for rehearing en banc within 20 days from the date of this order." *Id.*

Consequently, rather than entering an order enlarging the time for filing pursuant to Rules 40(a) and 26(b) and Tenth Circuit Local Rule 27.4.4, the court of appeals instead entered an order accepting the filing of a "late" petition.

The court of appeals' prudential decision to entertain the State's untimely petition did not extend the deadline for applying for certiorari. *Compare Missouri v. Jenkins*, 495 U.S. at 49. In *Jenkins*, the State filed a document in the court of appeals styled "State Appellants' Petition for Rehearing En Banc," *within* the prescribed time period for petitions for rehearing. *Id.* at 43. The question was whether this document actually constituted a "petition for rehearing," so as to toll the 90-day period. This Court concluded that it did. *Id.* at 47-48. In *Jenkins*, unlike this case, the court of appeals corrected the record by entering an order *nunc pro tunc* denying the State's "petition for rehearing with suggestion for rehearing in banc." *Id.* at 49. The court of appeals "cannot make the record what it is not," but it could correct the record to show that it had in fact entertained and denied a "petition for rehearing," even though the petition was incorrectly styled. *Id.* at 49-50.

There is only one exception to the rule that an untimely petition does not toll the period for seeking review, and this case is not within that exception. *See infra* Point I.B.

B. The State's Petition for Rehearing Was Untimely, the Circuit Court Denied It, and Accordingly the 90-Day Period for Seeking Certiorari Was Not Tolled

The Court has recognized but a single, narrow exception to the strict jurisdictional rule that only a timely petition for rehearing tolls a time for appeal: An untimely petition for rehearing tolls the limitations period for review *only* if the

court not only entertains, but actually grants, the petition for rehearing, and then proceeds to a merits review. *Pfister v. Northern Illinois Finance Corp.*, 317 U.S. 144, 149-151 (1942). *Accord Wayne United Gas Co. v. Owens Illinois Glass Co.*, 300 U.S. 131, 137 (1937); *Bowman v. Loperena*, 311 U.S. 262, 266 (1940).[51]

The mere fact that a court decides to entertain an untimely petition for rehearing does not mean that there is a merits review, for "[o]f course, the court must examine the petition to see whether it should be granted." *Pfister*, 317 U.S. at 150. "If a consideration of the reasons for allowing a rehearing out of time which are brought forward by the petition for rehearing were sufficient to resurrect the original order, the mere filing of an out of time petition would be enough." *Id.*

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[51] *See also Federal Trade Comm'n v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 210-12 (1952)(Court lacked jurisdiction to hear petition for certiorari as the 90-day period had not been tolled by untimely petition for review of the court of appeals' judgment, or the court's subsequent revision of that judgment in an immaterial way (citing *Pfister*)); *Federal Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20-21 & n.1. (1952)(dictum)(even if the motion resulting in the second order were viewed as an untimely petition for rehearing, the period for certiorari was tolled since the second order modified the first order, and therefore the court of appeals' reconsideration of its first order was "on the merits"); *Chin Gum v. United States*, 150 F.2d 765, 766 (1st Cir. 1945)(per curiam)(where 30-day period for petition to Supreme Court for certiorari expired, subsequent untimely petition for rehearing, filed by leave of court of appeals, but denied, did not revive jurisdiction of Supreme Court; result would have been different if the case had been restored to the docket for reargument (citing *Pfister*)); *Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor v. Hileman*, 897 F.2d 1277, 1279 (4th Cir. 1990)(untimely motion for reconsideration tolled the period for review since the motion for reconsideration was granted, and the Benefits Review Board reaffirmed its original order after considering the merits (citing *Bowman*)).

Under *Pfister*, any ambiguity about whether a court reached the merits of a rehearing petition is appropriately resolved by examining the terms of the court's order:

> [T]he order on the petition for review would control. It would show either a refusal to allow the petition for rehearing or a refusal to modify the original order. Whether time for appeal would be enlarged or not would depend upon what the order showed the court did.

Pfister, 317 U.S. at 150-51 (citation omitted).

In this case, it is clear that the Tenth Circuit did not decide the untimely petition on the merits. On February 28, 1996, the court entered an order denying the petition for rehearing, without restoring the case to the calendar, without issuing an opinion, and without any other indication that it had reached the merits.[52] The February 28 Order shows that the court

> merely consider[ed] whether the petition set [] out, and the facts . . . offered support[ed], grounds for opening the original order and determine[d] that no grounds for a reexamination of the original order [were] shown.

Pfister, 317 U.S. at 150.[53] Rule 40(a), Fed. R. App. P., is

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[52] Pet'r App. C at 18a-19a, Order entered February 28, 1996 (No. 95-5026).

[53] Of course, the Tenth Circuit undoubtedly did consider the arguments raised in the State's petition for rehearing; "[a] petition for rehearing is designed to bring to the panel's attention points of law or fact that it may have overlooked." Fed. R. App. P. 40(a). The panel is required to consider the contentions in the petition for rehearing, if only to reject them." *Missouri v. Jenkins*, 495 U.S. at 46 n.14. But it does not follow from this that there was a merits review. Tenth Circuit Local Rule 40.1 provides that a petition for rehearing will be granted "only if a significant issue has been overlooked or misconstrued by the court."

consistent with the bright-line test in *Pfister*, and with the procedure followed by the court below. The rule[54] contemplates a two-stage decision-making process, whereby the court examines the petition to determine whether it sets forth adequate grounds to justify a rehearing. Only if the petition supports the claim that the panel overlooked points of law or fact will the petition be granted and the court proceed to reconsider the merits.

In reiterating the rule that an untimely petition for rehearing does not toll the period for review unless the petition is granted and the court enters a subsequent judgment on the merits, the Court has warned applicants to

> take heed of [the] principle . . . that litigation must at some definite point be brought to an end. It is a principle reflected in the statutes which limit our appellate jurisdiction to those cases where review is sought within a prescribed period.

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[54] Fed. R. App. P. 40(a) provides that "[t]he petition must state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and must contain such argument in support of the petition as the petitioner desires to present." No oral argument is permitted at this stage; and the opposing party is not permitted to answer the petition unless requested by the court. But, "[i]f a petition for rehearing is *granted*, the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case." Fed. R. App. P. 40(a) (emphasis added).

Federal Trade Comm'n v. Minneapolis-Honeywell Regulator Co., 344 U.S. at 213. That the party seeking certiorari in this case is the State, and the party opposing it an indigent *pro se* prisoner, is no justification for abandoning a firmly entrenched jurisdictional rule.

II. THE STATE VIOLATED HARPER'S RIGHT TO DUE PROCESS WHEN IT REINCARCERATED HIM WITHOUT A HEARING

A. "Preparole" Is a Parole Program, and Gives Rise to a Fundamental Liberty Interest Under the Due Process Clause

A quarter of a century ago, in *Morrissey v. Brewer*, 408 U.S. 471 (1972), the Court held that a State may not revoke parole without a hearing. Chief Justice Burger, writing for the majority, concluded that

> the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a "grievous loss" on the parolee and often on others. . . . By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal.

Morrissey, 408 U.S. at 484. In reaching this conclusion the Court considered the following factors:

> The liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime. The parolee has been released from prison based on an evaluation that he shows reasonable promise of being able to return to

> society and function as a responsible, self-reliant person. Subject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life. Though the State properly subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison. He may have been on parole for a number of years and may be living a relatively normal life at the time he is faced with revocation. The parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions. In many cases, the parolee faces lengthy incarceration if his parole is revoked.

Id. These very same factors dictate a similar result in the case at bar. *See supra* Statement of the Case, at 2 - 7.

Mr. Harper does not dispute that a lawful conviction and prison sentence extinguish a defendant's right to freedom from physical confinement during the term of the sentence, and "empower the State to confine him in any of its prisons" and to "subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution." *Meachum v. Fano*, 427 U.S. 215, 224 (1976). However, when the State chooses to release a person from prison before the end of his sentence and permits him to live entirely outside an institution, "many of the core values of unqualified liberty" which his conviction extinguished are restored to him, even if on a conditional and qualified basis. *Morrissey*, 408 U.S. at 482. This is not "the absolute liberty to which every citizen is entitled, but only . . . the conditional liberty properly dependent on observance of special parole restrictions." *Id.* at 480. The individual has a liberty interest

arising under the Due Process Clause in retaining the conditional freedom the State has restored to him.

Thus, "'[i]t is not sophistic to attach greater importance to a person's justifiable reliance in maintaining his conditional freedom so long as he abides by the conditions of his release, than to his mere anticipation or hope of freedom.'" *Morrissey*, 408 U.S. at 482 n.8, (quoting *United States ex rel. Bey v. Connecticut Board of Parole*, 443 F.2d 1079, 1086 (2d Cir. 1971)). To the contrary, the principle that the State may not arbitrarily and capriciously take away the freedom it has conditionally restored is by now deeply imbedded in this Court's jurisprudence. *See Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973)(probation cannot be revoked without a hearing); *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 10-11 (1979) (there is a "critical distinction" between the initial grant of parole and the revocation of the conditional liberty of parolees); *Wolff v. McDonnell*, 418 U.S. 539, 560-62 (1974) (full range of procedures dictated by *Morrissey* is not required in discipline involving the loss of good-time credits, because "[f]or the prison inmate, the deprivation of good time is not the same immediate disaster that the revocation of parole is for the parolee" since it "does not then and there work any change in the conditions of his liberty.").

The State argues that *Morrissey* is inapplicable here because "the nature of the interest [of a preparolee] is very different from that of the parolee." (Pet'r Br. at 18). However, "[t]he essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence." *Morrissey*, 408 U.S. at 477. None of the differences asserted by the State, either alone or in combination, distinguish preparole from parole for purposes of *Morrissey*. *See supra* Statement of the Case at 2 - 7.

Of course, there are limitations and conditions on the liberty that preparolees enjoy, which "restrict their activities substantially beyond the ordinary restrictions imposed by law on an individual citizen," *Morrissey* at 478; but these limitations and conditions are virtually identical to the standard conditions imposed on parolees in Oklahoma,[55] and are essentially the same as the conditions and limitations described in *Morrissey*.[56] Once Mr. Harper was released

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[55] *See* Resp't App. C at 27a-30a, Parole Fact Sheet; J.A. at 7-9, Rules and Conditions of Pre-Parole Conditional Supervision. The State claims that there are "many" differences between parole and preparole conditions, but lists only two:

> (1) a parolee can leave the state while an inmate on the Program [preparole] cannot; and (2) a parolee may be unsupervised after three years on parole while an inmate on the Program must remain supervised at all times. *See* Okla. Stat. tit. 57, § 347 (1991); Okla. Stat. tit. 57, § 512 (Supp. 1993).

Pet'r Br. at 17 n.10. Even these minor differences, however, are less than meet the eye. Parolees who are sex offenders must remain on active supervision until the maximum term of their sentences; other parolees are subject to active supervision beyond three years, at the discretion of the Division of Community Services. *See* Okla. Stat. § 512(2). Parolees cannot leave the state except with written permission, according to the Standard Rules and Conditions for Parolees. *See* Resp't App. C.

[56] The *Morrissey* Court gave the following examples at 408 U.S. at 478:

> Typically, parolees are forbidden to use liquor or to have associations or correspondence with certain categories of undesirable persons. Typically, also they must seek permission from their parole officers before engaging in specified activities, such as changing employment or living quarters, marrying, acquiring or operating a motor vehicle, travling [sic] outside the community, and incurring substantial indebtedness. Additionally, parolees must regularly report to the parole officer to whom they are assigned and sometimes they must make periodic written reports of their activities.

from prison, he had a substantial interest in retaining the freedom that was conditionally restored to him.

The State of Oklahoma argues that *Morrissey* does not apply in this case, because preparole is merely a form of "confinement, albeit constructive." (Pet'r Br. at 17-18).[57] Since "[t]he inmate remains in the custody of the DOC," (Pet'r Br. at 11), it follows that "[t]he only difference between an inmate behind four walls and an inmate on the Program is the security level classification." Because the preparolee is already "constructively" in prison, the State's decision to revoke preparole does not actually return the preparolee to prison; it merely effects a "transfer . . . to a higher security level," a matter "completely within the discretion of the DOC." (Pet'r Br. at 32).

This argument is unpersuasive for two reasons. First, the fact that preparolees are formally "in custody" is of no particular significance; for so are parolees.[58] More important, this very same "in custody" argument was advanced by the State of Iowa, and rejected by the Court, a

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[57] *See also* Pet'r Br. at 11, 15, 24, 28, 30, 31. This reading of the statute is inconsistent with the statutory provision that if preparole is *revoked*, the preparolee "shall be returned to confinement in the custody of the Department of Corrections." *See* Okla. Stat. § 365(G) (Supp. 1995). It is also inconsistent with the Parole Board's reading of the statute: "The conditions [of preparole] are very similar to parole. If an inmate does not comply with the conditions, he or she can be removed from the program and *brought back to prison*." Resp't App. A at 9a, Parole Board Brochure (1989) (emphasis added).

[58] *See Spurlock v. State of Oklahoma*, 720 P.2d 733, 734 (Okla. Crim. App. 1986), *rev'd on other grounds*, *Plotner v. State*, 721 P.2d 810 (Okla. Crim. App. 1986).

quarter of a century ago, in *Morrissey*. There, the State cited an Iowa statutory provision that "[a]ll paroled prisoners shall remain, while on parole, in the legal custody of the warden or superintendent."[59] The State argued that since "[t]he parolee while on parole is still within the custody of the correctional authorities" he is therefore "entitled to no greater rights than a prisoner."[60] The Court rejected this argument, finding that parolees have a significant liberty interest in avoiding a return to confinement, and requiring the State to grant a revocation hearing. *See Morrissey*, 408 U.S. at 483-84. "Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions." *Id.* at 480. That the parolee "is often formally described as being in custody" does not mean that "summary treatment is necessary as it may be with respect to controlling a large group of potentially disruptive prisoners in actual custody." *Id.* at 483.[61]

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[59] Resp't Br. at 6-7 filed in *Morrissey v. Brewer*, September Term, 1971 (No. 71-5103).

[60] Resp't Br. at 19-20, filed in *Morrissey v. Brewer*, September Term, 1971 (No. 71-5103). The court of appeals in *Morrissey* accepted the State's argument, reasoning that *parole* "is only a correctional device authorizing service of sentence outside the penitentiary," that the parolee is still "in custody," and thus, that "prison officials must have large discretion in making revocation determinations, and [] courts should retain their traditional reluctance to interfere with disciplinary matters properly under the control of state prison authorities." *Morrissey v. Brewer*, 408 U.S. at 474-75 (quoting Morrissey, 443 F.2d. 942, 947 (8th Cir. 1971)).

[61] As evidence that a preparolee, unlike a parolee, is "in custody," the State points out that preparolees who abscond may be prosecuted for escape, while parolees who escape merely have their parole revoked. (Pet'r Br. at 11). This difference is irrelevant. While liability to prosecution for escape represents a significant additional motive to

Sandin v. Conner, 115 S.Ct. 2293 (1995), supports the conclusion that Mr. Harper had a liberty interest arising under the Due Process Clause in not being returned to prison without a hearing. Reaffirming the principles articulated in *Morrissey* and *Wolff v. McDonnell*, *Sandin* held that for a liberty interest to arise directly under the Due Process Clause, prisoners must have "suffered a 'grievous loss' of liberty retained even after sentenced to terms of imprisonment." *Sandin*, 115 S.Ct. at 2298 (citation omitted). Under this standard, the Court found that Conner had not suffered such a loss. Disciplinary segregation for 30 days did not "present a drastic departure from the basic conditions of Conner's indeterminate sentence" because the record showed that disciplinary segregation "mirrored those conditions imposed upon inmates in administrative segregation and protective custody." *Id.* at 2301. Thus, "[b]ased on a comparison between inmates inside and outside disciplinary segregation, the State's actions in placing him there for 30 days did not

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preparolees to conform to the rules of their release, it does not in any way reduce or devalue the freedom they enjoy. Equally irrelevant is the fact that Oklahoma law provides that "should an inmate violate any rule or condition during the period of community supervision, the inmate shall be subject to disciplinary proceedings as established by the Department of Corrections." (cited in Okla. Stat. § 365; Pet'r Br. at 10-11, 17, 24). To interpret this statute to mean that preparolees are subject to the *same* rules as prisoners would be absurd. By its very nature, life in the community frees the parolee from prison-specific rules; the list of preparole rules which were imposed on Mr. Harper did not include obedience to prison rules. *See* J.A. at 7-9, Rules and Conditions of Pre-Parole Conditional Supervision. The State also points to the fact that "[t]he inmate continues to receive earned credits [for time served] while on the Program." (Pet'r Br. at 19 n.12). However, it is not just preparolees but also parolees who continue to receive credit for time served while on release programs. *See* Okla. Stat. tit. 57, § 350(a).

work a major disruption in his environment." *Id.*[62] Chief Justice Rehnquist, writing for the majority, stressed that the State's action in Conner's case would not "inevitably affect the duration of his sentence" since the State's code did not require the parole board "to deny parole in the face of a misconduct record or to grant parole in its absence." *Sandin*, 115 S.Ct. at 2302.

Under the reasoning of *Sandin*, which focused on whether the individual had suffered a "grievous loss" of liberty retained even after sentence to imprisonment, this case presents the very situation in which the Due Process Clause *does* confer a liberty interest. Preparolees, like parolees, are no longer prisoners, even though like parolees they remain "in the custody" of the DOC. The revocation of preparole, exactly like the revocation of parole, is an "immediate disaster," since it "then and there" works a dramatic change in the conditions of the individual's liberty. *See Wolff v. McDonnell*, 418 U.S. at 561. When the State returned Mr. Harper to prison without a hearing, it stripped from him those "core values of unqualified liberty" which it had restored to him when he left the prison five months earlier; he was removed, not to a worse prison from a better prison, but to a

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[62] The Court further held that a state might conceivably create a liberty interest in freedom from restraint in the prison setting, if the restraint involved an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life[,]" *id.* at 2300; but punishment by solitary confinement is not such a restraint, because "[d]iscipline by prison officials in response to a wide range of misconduct falls within the expected parameters of the sentence imposed by a court of law." *Id.* at 2301. Mr. Harper's case, like *Morrissey*, involves a liberty interest arising directly under the Due Process Clause. Although nominally "created" by the State when the prisoner walks out the prison door on conditional release, the liberty at stake is the "core liberty interest" of a free person, which is conditionally and partially restored to the parolee.

prison from freedom. By any measure, this was "a grievous loss" of liberty: freedom from physical confinement "has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (citing *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982)). "[O]ur notions of liberty are inextricably entwined with our idea of physical freedom and self determination," *Cruzan v. Director, Missouri Dep't of Health*, 110 S.Ct. 2841, 2856 (1990) (O'Connor, J., concurring). Since "incarceration of persons is the most common and one of the most feared instruments of state oppression and state indifference, . . . freedom from this restraint is essential to the basic definition of liberty" in the Fifth and Fourteenth Amendments. *Foucha*, 504 U.S. at 90 (Kennedy, J., dissenting).

The State claims that parole and preparole are essentially different, because "an inmate is released to parole after an evaluation that he can return to society and function as a responsible person," whereas "[a]n inmate is not placed on [preparole] after a finding that he will function well in society," but rather "pursuant to the need of the State to manage its prison population." (Pet'r Br. at 18). This purported distinction is not supported by the statutory language and has been contradicted by the State's repeated admissions in the lower courts. *See supra* Statement of the Case at 1-2. True enough, Oklahoma's preparole statute does not explicitly require the Parole Board to find that the preparolee "shows reasonable promise of being able to return to society and function as a responsible and self-reliant person;" but not even Oklahoma's *parole* statute explicitly requires the Board to make such a finding.[63] Nevertheless, implicit in the entire statutory and administrative scheme is a

[63] *See* Okla. Stat. § 365; Okla. Stat. §§ 332.7, 332.8.

requirement that the Parole Board determine that a prisoner "shows reasonable promise of being able to return to society and function as a responsible and self-reliant person," before ordering his release on either parole *or* preparole. It is unthinkable that the Parole Board and DOC would exercise their discretion to release a felon *without* making such a determination.

The State further argues that parole and preparole are different because, under *Morrissey*, "a parolee relies on an implicit promise that parole will be revoked only if he violates a condition of parole," while "an inmate on the [preparole] Program is not given a promise that he will be transferred only if he violates a condition of the Program," but instead "is aware that he may be reclassified to a higher security level [*i.e.*, returned to prison] for any reason," (Pet'r Br. at 18), or "for no reason," (Pet'r Br. at 20). This claim is simply not supported by the statutory language, the implementing regulations, or anything else in this record. Whatever the DOC may tell prisoners *now* about their release on preparole, the record does not show that *Mr. Harper* was provided notice that he could be returned to prison for any reason other than a violation of the conditions of his release. The "evidence" the State cites to the contrary, (Pet'r Br. at 6 & n.3, 20 n.13), simply does not support its assertion. *See supra* Statement of the Case at 5 - 9.[64]

In this Court, although not below, the State argues that preparole is like a furlough, and thus cannot give rise to a liberty interest, citing *Bowser v. Vose*, 968 F.2d 105 (1st Cir. 1992) (per curiam) and *Smith v. Saxbe*, 562 F.2d 729 (D.C.

[64] There was no statutory "promise" to Iowa parolees in *Morrissey* that they would not be returned to prison except for violations of the conditions of their release, any more than there was a statutory "promise" to Mr. Harper (or to Oklahoma parolees, for that matter).

Cir. 1977). However, there is a profound difference between the "liberty" bestowed in a furlough program, and the "liberty" which a conditional release program like parole or preparole restores to a prisoner. The furlough program described in *Bowser v. Vose* was typical of furlough programs, in that it permitted release from prison for a definite, brief period of time, to attend a relative's funeral, visit a critically ill family member, obtain medical care, or establish employment or housing plans for release. *Bowser v. Vose*, 968 F.2d at 106 n.1. The First Circuit explicitly distinguished the prisoner's furlough denial from the deprivation of liberty when parole is revoked based upon the nature of the liberty involved: "'Unlike the parolee or probationer . . . , the furloughed prisoner is on a short string. His freedom is not potentially unlimited in duration even upon compliance with the official rules.'" *Id.* at 107 (citation omitted).[65] Similarly, preparole is utterly unlike furlough because it is potentially unlimited in duration, and the goal is

[65] Likewise, the federal statute at issue in *Smith v. Saxbe* limited furloughs to thirty days, unless extended for specific, enumerated purposes. *Smith v. Saxbe*, 562 F.2d at 731 n.3. The State also cites *United States v. Taylor*, 47 F.3d 508 (2d Cir. 1995), for the proposition that preparole does not give rise to a liberty interest because the defendant was "in custody" while in Connecticut's "Supervised Home Release Program," a program "strikingly similar" to Oklahoma's preparole program; ergo, preparolees must also be "in custody," and if they are "in custody" in the program they have no liberty interest in remaining in the program. (Pet'r Br. at 20-22). *Taylor* did not address the question of whether the defendant had any liberty interest in remaining in Connecticut's "Supervised Home Release Program." The issue in *Taylor* was whether or not the defendant was legally "in custody" while in the Program for purposes of deciding when his term of federal probation began to run.

nothing less than the complete reintegration of the offender into the community.[66]

Nevertheless, the State asserts, when a preparolee is released from prison he is merely "transferred for a limited time for the purpose of overcrowding. Once the purpose of the Program is eliminated, the inmate may be transferred to a facility as his placement in the Program will no longer serve the purpose for which it is intended." (Pet'r Br. at 15 n.9.) In fact, the Oklahoma statute provides nothing of the kind. Rather, the statute provides that whenever the State's prison population exceeds 95 percent of capacity, the Parole Board and DOC must "implement" the preparole program "until such time as the [prison] population is reduced to ninety-two and one-half percent (92 1/2 %) of capacity." *See* Okla. Stat. § 365. The plain language and obvious intent of this provision is that State authorities must cease releasing prisoners on preparole status when the prison population is reduced to 92 1/2 percent of capacity. Nothing in either the statute or the implementing regulation indicates that an individual preparolee is to be *returned* to prison when and if the prison population drops; and if the statute did so provide, that would present a serious problem of substantive due process. The liberty guaranteed by the Due Process Clause "'includes a freedom from all substantial arbitrary impositions and purposeless restraints.'" *Planned Parenthood v. Casey*, 505 U.S. 833, 848 (1992) (citation omitted). It is not

[66] If the Oklahoma statute in fact provided what the State earlier claimed in this case -- namely, that the Governor's denial of parole disqualified an individual from preparole -- this case might be different. The argument could then be made that preparole resembled a furlough that would definitely end upon the Governor's denial of parole. The record in this case, however, does not support that characterization. If there were any significant ambiguity in that regard, the proper course would not be to resolve the doubt in the State's favor, but rather to remand for the evidentiary hearing that Mr. Harper was denied.

apparent that the State could have *any* legitimate interest in returning to prison a model preparolee, perhaps after many years at liberty, simply because a prison bed became available. However, that issue is not presented here; Oklahoma's law does not permit the interpretation the State suggests, and there is no evidence that the State itself has ever returned a preparolee to prison on this ground.

B. The State's Newly-Asserted Claim That It May Revoke Preparole "For Any Reason or No Reason" Is Unsupported By the Record and Is Incompatible With Substantive Due Process

Unable to defend its earlier stance that parole denial *disqualifies* an individual for preparole, the State now asserts that corrections officials have the authority to revoke preparole, not only if the Governor denies parole, but "for any reason or no reason." If the Oklahoma statute purported to confer any such unlimited authority on state officials, this case would present the question whether the States could circumvent *Morrissey* simply by amending their parole laws to provide that parole may be revoked "for any reason or no reason" or whether the Due Process Clause would forbid such a result.

However, that question is not presented by this case: the Oklahoma statute does *not* purport to confer any such limitless discretion on state officials who administer the program. As discussed in Point II.A., *supra*, the Oklahoma legislature created a conditional release program which differs from the "parole" described in *Morrissey v. Brewer* in little more than name. It is implicit in the statutory scheme that the conditional freedom the State restored to the prisoner will *not* be revoked "for any reason or no reason," but only if the preparolee has done *something* to forfeit the conditional freedom the State restored to him.

In the absence of an explicit statutory grant of authority to revoke preparole "for any reason or no reason," the issue is the more narrow one of whether correctional officials can take it upon themselves to revoke conditional release status "for any reason or no reason," consistent with substantive due process. The answer to this question is that they cannot. A person conditionally released from prison has a constitutionally protected right not to be arbitrarily returned to prison. *See supra* Point II.A. The Due Process Clause imposes substantive as well as procedural limits on the State's authority to revoke this conditional liberty. *See Black v. Romano*, 471 U.S. 606, 610 (1985) (dictum) (probation); *Bearden v. Georgia*, 461 U.S. 660, 665-66, 668-69 (1983) (trial court's automatic revocation of probation for the probationer's failure to pay the imposed fine and restitution was "fundamentally unfair," in the absence of evidence and findings that the defendant was somehow responsible for the failure or that alternative means of punishment were inadequate); *Douglas v. Buder*, 412 U.S. 430 (1973)(*per curiam*) (substantive violation of due process where state court revoked probation with no evidence that the probationer had violated probation).[67]

State action or regulations that burden the exercise of a fundamental constitutional right will be held to offend the Due Process Clause unless the State's action is "generally necessary" to serve a legitimate government interest; there must be a "close fit" between the challenged regulation and the interest it purports to serve. *See Thornburgh v. Abbott*,

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[67] Justice O'Connor, delivering the opinion for a unanimous Court in *Bearden v. Georgia*, stated that the probationer's "lack of fault provides a substantial reaso[n] which justifie[s] or mitigate[s] the violation and make[s] revocation inappropriate." *Bearden*, 461 U.S. at 669 (quoting *Gagnon v. Scarpelli*, 411 U.S. at 790 (internal quotation marks omitted)).

490 U.S. 401, 411, 413 (1989).[68] Accordingly, the State must show that revoking Mr. Harper's preparole status without a hearing and returning him to prison *merely* because the Governor denied parole -- or "for any reason or no reason" -- was "generally necessary" to further a legitimate government interest.

The State has shown no such thing. In fact, the State has not met even the exceedingly deferential test of *Turner v. Safley*, 482 U.S. 78, 89 (1987), which applies in cases where the exercise of a fundamental constitutional right can reasonably be expected to present a danger to the community *inside* the prison. Under *Turner*, there must at least be a "'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." *Id.* (citation omitted). There is no such connection here. "[A] regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational." *Turner*, 482 U.S. at 89-90.[69]

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[68] This standard applies even in the prison context, in cases where the exercise of the fundamental constitutional right "cannot reasonably be expected to present a danger to the community *inside* the prison." *Thornburgh v. Abbott*, 490 U.S. at 411-412. This is the applicable standard here, since the exercise of the preparolee's liberty does not take place "[i]n the volatile prison environment, [where] it is essential that prison officials be given broad discretion to prevent [] disorder." *Id.* at 413. Hence, it "[does] not, by its very nature, pose a serious threat to prison order and security," *id.* at 411 (explaining *Procunier v. Martinez*, 416 U.S. 396 (1974)). *See also Morrissey*, 408 U.S. at 485.

[69] Under *Turner*, a second factor in determining reasonableness is "whether there are alternative means of exercising the right that remain open to prison inmates." *Turner*, 482 U.S. at 90. Here, there is obviously no alternative. As to "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally[,]" there can be no negative

The State's interest in implementing release programs to relieve a prison overcrowding crisis is indisputably a legitimate one; however, the State does not explain how or why it is "rationally related" to this interest, let alone "generally necessary" to it, to return to the State's overcrowded prisons a model preparolee, who has obeyed all the rules and conditions of his release, and who has given parole officials no reason to believe that his continued release would endanger the community or his own chances for successful rehabilitation.[70]

Amici attempt to fill this void, suggesting that "even though Mr. Harper did not violate the rules of the program, the prison officials may have determined that due to parole denial, Mr. Harper was more likely to flee from justice or that the safety of the community was at greater risk." (Br. of Amici Curiae at 9).[71] But the State of Oklahoma has never

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"ripple effect" on inmates, guards, or prison resources, from *not* returning to prison a model preparolee. *Id.*

[70] Additional evidence that the policy is arbitrary is provided in the State's evolving explanation for returning Mr. Harper to prison without any hearing at all. The reason the State originally gave for revoking Mr. Harper's preparole was that the Governor's rejection of the Parole Board's parole recommendation automatically made Mr. Harper "ineligible" for preparole and thus, there was no need for a hearing since there was no fact to determine. This claim turned out to be contradicted by the State's own regulations. *See supra* Statement of the Case at 7-9. The State now claims that it has the authority to return a preparolee to prison "for any reason or no reason."

[71] There is no statutory or regulatory presumption in Oklahoma that parole denial makes a preparolee susceptible to flight; to the contrary, Parole Board regulations provide that in cases where the Governor denies parole the preparolee is to retain his conditional liberty, and remain in the community in preparole status, unless he is thereafter "classified to a higher security level after due process." Most preparolees are permitted

suggested that it revoked Mr. Harper's preparole because it "determin[ed] that due to parole denial, Mr. Harper was more likely to flee from justice or that the safety of the community was at greater risk." The State should not be permitted to raise such a claim in Mr. Harper's case, so late in the day. However, if this were the basis on which preparole was actually revoked in Mr. Harper's case, then Mr. Harper ought to have had notice of this basis, and an opportunity to address it at a *Morrissey*-style hearing. *See infra* Point II.C.

C. A Morrissey-Style Hearing Is Required

To determine what procedural protections the Constitution requires in a particular case, the Court weighs the private interest that will be affected by the official action; the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interests, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The standard set forth in *Mathews* is fully applicable in the prison context. *See Washington v. Harper*, 494 U.S. 210, 229 (1990). "The procedural protections required by the Due Process Clause must be determined with reference to the rights and interests at stake in the particular case." *Id.* (citing *Morrissey v. Brewer*, 408 U.S. at 481). The same rights and interests are at stake in this case as in the revocation of parole, and therefore a *Morrissey*-style hearing is appropriate.

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to remain in the community after a denial of parole by the Governor. *See supra* Statement of the Case at 4.

1. The Private Interest

The private interest that will be affected is the individual's interest in not having his conditional freedom unjustifiably taken away. There is scarcely any other private interest so significant. The revocation of conditional freedom is "an immediate disaster" for the individual returned to prison. *Wolff v. McDonnell*, 418 U.S. at 560-561 (discussing parole). Revocation proceedings determine whether the person conditionally released "will be free or in prison, a matter of obvious great moment to him." *Id.* at 560. This private interest is entitled to added weight, since it coincides with interests of the State. In *Gagnon v. Scarpelli*, the Court found that

> [b]oth the probationer or the parolee and the State have interests in the accurate finding of fact and the informed use of discretion -- the probationer or parolee to insure that his liberty is not unjustifiably taken away and the State to make certain that it is neither unnecessarily interrupting a successful effort at rehabilitation nor imprudently prejudicing the safety of the community.

411 U.S. at 785. *See also Wolff v. McDonnell*, 418 U.S. at 561 (revocation decision "based on an accurate assessment of the facts is a critical matter to the State as well as the parolee.") Similarly, unjustifiably returning a preparolee to prison thwarts the statutory purpose of relieving prison overcrowding by conditionally releasing to the community prisoners who can live as responsible and self-reliant members of society.

2. The Value of a Hearing

The risk of needless, purposeless revocation is enormous when, as in Mr. Harper's case, the State holds no hearing at all.[72] The State argues that there is no value in a preparole revocation hearing in cases where preparole is revoked merely because the Governor did not approve parole; for "[where] there is no 'claimed violation,'" (Pet'r Br. at 22), "there is no factual question." (Pet'r Br. at 23). According to the State, "'verified facts' and 'accurate knowledge of the parolee's behavior' are not necessary in making the decision of whether to transfer an inmate to a higher level of security" (*i.e.*, return the preparolee to prison), because "[s]uch a determination is purely predictive and discretionary" and "would not be assisted by any type of adversary proceeding." (Pet'r Br. at 23.)

In fact, however, the value of procedural safeguards is as great here as in revocation of parole or probation. That a revocation decision may be "predictive and discretionary" does not mean that it can be arbitrary. It must be an individualized determination of a person's suitability to remain at liberty, informed by consideration of the relevant, ascertainable facts.

The decision to revoke preparole is neither more nor less "predictive and discretionary" than the decision to revoke parole. In *Morrissey*, the Court pointed out that the "enforcement leverage that supports the parole conditions derives from the authority to return the parolee to prison to

[72] Procedures promulgated after Mr. Harper was returned to prison provide for some sort of "due process" review before a preparolee may be returned to prison on the basis of parole denial, *see supra* Statement of the Case at 9 n.28, but there is no evidence in the record as to what that review entails.

serve out the balance of his sentence if he fails to abide by the rules." 408 U.S. at 478-79. The Court concluded that "implicit in the system's concern with parole violations is the notion that the parolee is entitled to retain his liberty as long as he substantially abides by the conditions of his parole." *Id.* at 479. That same notion is implicit in preparole, for the same reasons: in the words of the Oklahoma Parole Board, "the conditions [of preparole] are similar to parole. If an inmate does not comply with the conditions, he or she can be removed from the program and returned to prison."[73]

The reality is, as the *Morrissey* Court recognized, that even in the case of parole, parole officers typically are accorded broad discretion as to whether or not to revoke parole; that discretion is "inherent in some of the quite vague conditions, such as the typical requirement that the parolee avoid 'undesirable' associations or correspondence." 408 U.S. at 479. Whether or not a clear-cut violation of a black-letter rule is charged, the fundamental issue that concerns the parole officer is whether or not the parolee's or preparolee's conduct in the community shows he is able to function as a responsible member of society, and thus whether or not he should be permitted to retain his conditional freedom.[74]

In *Morrissey*, as here, the State argued that hearings should not be required because "non-legal, non-adversary considerations" were often the determinative factors in making

[73] Resp't App. A at 9a, Parole Board Brochure (1989).

[74] Thus, the Court need not reach the question of whether something less than a violation of the conditions of release will justify revocation of preparole.

a parole revocation decision.[75] This Court rejected the argument, holding that "[w]hat is needed is an informal hearing structured to assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior." *Morrissey*, 408 U.S. at 484. Similarly, although "[t]he decision to revoke probation is generally predictive and subjective in nature," *Black v. Romano*, 471 U.S. at 613 (1985) (citing *Gagnon v. Scarpelli*, 411 U.S. at 787), the Court requires *Morrissey*-style hearings for probation revocation because "[b]oth the probationer . . . and the State have interests in the accurate finding of fact and the informed use of discretion." *Gagnon*, 411 U.S. at 785. Justice O'Connor, delivering the opinion of the Court in *Black v. Romano*, explained that when a statute confers discretion on a factfinder to revoke conditional release status, the exercise of that discretion must be informed by the facts:

> Where such discretion exists . . . , the parolee or probationer is entitled to an opportunity to show not only that he did not violate the conditions, but also that there was a justifiable excuse for any violation or that revocation is not the appropriate disposition.

Black v. Romano, 471 U.S. at 612.[76]

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[75] *See* Resp't Br. (No. 71-5103) filed in *Morrissey v. Brewer* (at 11 n.2); *see also Morrissey v. Brewer*, 408 U.S. at 475.

[76] *Compare Schall v. Martin*, 467 U.S. 253, 277-79 (1984) (state law authorizing pretrial detention of an accused juvenile delinquent, based on a finding of either a "serious risk" that the juvenile may commit a criminal act before his next court appearance, or a "substantial probability" of flight, did not violate the Due Process Clause, since the procedural safeguards the statute afforded, including notice, a hearing, a statement of facts and reasons given prior to detention, a formal probable cause hearing, a fact-finding hearing, and a stenographic record of the initial

Here, the State treated the Governor's decision to deny Mr. Harper parole as conclusive proof that Mr. Harper was unfit for preparole (even though neither statute nor agency regulations required any such result, and even though the Governor has no statutory role at all in preparole decisions). The Parole Board declined to hear any evidence of Mr. Harper's conduct while he was at liberty in the community. It refused him any opportunity to testify and to present testimony from his parole officer, employer, co-workers, family, friends, and other members of the community, about his conduct and accomplishments during his months at liberty, to show that revocation was not warranted in his case, and to rebut any erroneous facts which may have influenced the decision to revoke. Further, the Board failed to explain the reason for its decision, apart from the bare fact of the Governor's parole denial, thus leaving no basis for review to determine if the decision to revoke rested on permissible grounds supported by the evidence. Consequently, the decision that Mr. Harper was no longer fit for preparole was not based on verified facts, and the exercise of discretion to return him to prison was not informed by knowledge of his behavior on preparole. *See Morrissey*, 408 U.S. at 484.

3. The State's Interest

The State's interests in avoiding revocation hearings for preparolees are minimal. Revocation proceedings do not involve the problems inherent in "controlling a large group of potentially disruptive prisoners in actual custody." *Morrissey*, 408 U.S. at 483. In *Wolff v. McDonnell*, 418 U.S. at 561-62,

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appearance as a basis for review of individual cases, provided "sufficient protection against erroneous and unnecessary deprivations of liberty." *Id.* at 274 (citing *Mathews v. Eldridge*, 424 U.S. at 335).

the Court elaborated on the "very different stake the State has in the structure and content of the prison disciplinary hearing" in contrast to a parole revocation hearing. Prison disciplinary proceedings "take place in a closed, tightly controlled environment" where "[g]uards and inmates co-exist in direct and intimate contact" and "[t]ension between them is unremitting;" whereas:

> the procedures by which it is determined whether the conditions of parole have been breached do not themselves threaten other important state interests, parole officers, the police, or witnesses -- at least no more so than in the case of the ordinary criminal trial.

Id. at 561.

Although the State does not articulate any particular interest in revoking preparole with no hearing at all, the Amici predict that a "determination that a liberty interest is created" by release on preparole "would cause many of the Amici States to eliminate such programs due to the burden of providing a hearing pursuant to *Morrissey v. Brewer*;" would "discourage states from experimenting with new procedures or programs utilized to eliminate the overcrowding dilemma;" and would "impose an enormous financial burden on the Amici States and restrict the ability of prison administrators to manage their correctional facilities." (Br. of Amici Curiae at 2-3.) These fears are surely greatly exaggerated; particularly because the costs and burdens associated with holding a hearing to determine whether the State has a legitimate interest in returning an individual to prison cannot possibly compare to the extremely heavy costs and burden of actually incarcerating him. Indeed, since the cost of incarcerating a person is more than fifteen times greater than the cost of supervising him on parole, it is unlikely that the

States will dispense with conditional release programs in order to escape the burden of revocation hearings.[77]

In *Morrissey*, the State predicted, and the Court of Appeals agreed, that if adversary hearings were required for parole revocation, the function of the parole board "would be aborted," and the parole board "would be more reluctant to grant parole in the first instance." 408 U.S. at 475. This Court rejected the claim that providing a hearing "would be administratively intolerable," and concluded that "[a] simple factual hearing [would] not interfere with the exercise of discretion." *Id.* at 483. After a quarter of a century, it is safe to say that requiring revocation hearings has not discouraged the States from implementing parole systems or granting parole.[78] There is no reason to suppose that the dark fears expressed by the Amici, about the disastrous results of requiring preparole revocation hearings, are not as exaggerated as the fears expressed by the State in *Morrissey*.

CONCLUSION

The Court lacks jurisdiction; therefore the writ of certiorari should be dismissed as improvidently granted and the case should be remanded to the Tenth Circuit to reinstate its mandate to the District Court. If the Court decides that it

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[77] It costs $22,000 per year in operating expenses to incarcerate, and an overall average of $1325 per year to supervise on parole. C. Camp & G. Camp, The Corrections Yearbook -- Adult Corrections at 1, 49 (1995); The Corrections Yearbook -- Probation and Parole at 43 (1995).

[78] In the five-year period ending January 1, 1995, the number of adults on active parole supervision in the United States increased from 545,804 to 664,404. *See* C. Camp and G. Camp, The Corrections Yearbook Probation & Parole at 30-31 (1990); The Corrections Yearbook -- Probation & Parole at 47-48 (1995).

has jurisdiction, it should affirm the decision of the Tenth Circuit.

Respectfully submitted,

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September, 1996

No. 95-1598

In The

Supreme Court of the United States

October Term, 1995

LEROY L. YOUNG AND
ATTORNEY GENERAL OF OKLAHOMA,

Petitioners,

v.

ERNEST EUGENE HARPER,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Tenth Circuit

APPENDIX TO BRIEF OF RESPONDENT

TABLE OF CONTENTS

Appendix		Page
A	Pardon and Parole Board Brochure (1989)	1a
B	Pardon and Parole Board Brochure (1992)	15a
C	Parole Fact Sheet (effective 6/91)	27a
D	Rules and Conditions Pre-Parole Conditional Supervision/Electronic Monitoring/ Specialized Supervision/House Arrest (effective 6/93)	31a
E	DOC Policy and Operations Manual Procedure 0P-160120	35a
F	Pardon and Parole Board Procedure No. 004-11 (effective 4/1/94)	36a
G	Daily Oklahoman May 29, 1996	40a
H	Pardon and Parole Board Procedure 004-11 (effective 9/1/89)	43a
I	DOC Interim Pre-Parole Conditional Supervision Revocation OP-060208	51a
J	Okla. Stat. tit. 57, §365	83a
K	Okla Stat. tit. 57, §332.7	86a
L	Okla. Stat. tit. 57, §332.8	88a
M	Okla. Stat. tit. 57, §350	90a
N	Okla. Stat. tit. 57, §512	91a

APPENDIX A

1989

STATE OF OKLAHOMA

PARDON AND PAROLE
BOARD

Pardon and Parole Board
4040 North Lincoln Blvd. Suite 219
Oklahoma City, Oklahoma 73105

The Pardon and Parole Board is a constitutionally - created body charged with making clemency recommendations concerning convicted adult felons. Their recommendations are subject to approval by the Governor. There are five members who serve four-year terms coterminous with the Governor. Three members are appointed by the Governor, one member by the State Supreme Court, and one member by the Court of Criminal Appeals. There are no statutory requirements for qualifications or background, so the members come from all walks of life. The members are not employees of the state, and they serve part-time. Any attorney who serves on the Board is not allowed to practice criminal law nor be part of a law firm which practices criminal law during the term of service.

AGENCY STAFF

There are approximately 30 members of the support staff, full-time employees of the State of Oklahoma. These employees administer the daily operation of the agency, prepare reports to the Board and answer inquiries from public officials, the news media and the general public.

The agency is headed by the Executive Director, who is responsible for the overall operation of the agency. The Executive Director is assisted by the Deputy Director. The agency also has a General Counsel, who addresses legal issues facing the agency.

Reports and investigations for the Pardon and Parole Board on individual candidates for parole, pre-parole and commutation are compiled by investigators. These investigators have previous experience in the correctional field, and are assigned to correctional facilities throughout the state.

MEETINGS

The Pardon and Parole Board meets once each month to consider candidates for parole, commutation of sentence, Pre-Parole Conditional Supervision and pardon. The meetings are generally held over a two-day period, on Friday and Saturday of the designated week. Meetings are open to the public, and are conducted in accordance with the Open Meeting Act. A schedule of Board meetings and dates for specific meetings can be obtained by writing to the address listed at the end of this brochure.

PAROLE

How do inmates come up for parole?

Inmates are assigned parole docket dates in several ways. The most common is one-third of the sentence. By state law, all inmates must be considered for parole by the time they have served one-third (except escapees, inmates involved in riots, and certain robbery offenders).

One-third dates are calculated on a maximum sentence length of 45 years. Those with sentences in excess of 45 years (including life sentences) are calculated as 45-year sentences for docketing purposes. Therefore, the maximum one-third date by policy is 15 years.

Another docket reason is the presumptive parole date (PPD). The PPD was established in an effort to compensate for sentencing disparities for some offenders in prison for the first or second time. The PPD was derived by analyzing the average time served for a given offense type and determining a number of months to be served before parole consideration. Approximately 15 percent of the inmates considered for parole are considered based upon the PPD. This date can be aggravated (set off) if information is received from official

sources which demonstrates that the crime is more serious than the offense title would [text missing in original].

A parole matrix is used in the determination of the PPD. Offense titles are placed in categories from A through D, with Category A offenses being the most serious. The category of offense and the assessed risk level determine what the PPD will be. Some examples are:

Category A - Kidnapping, Shooting With Intent to Kill, Manslaughter First Degree.

Category B - Robbery With Firearms, Distribution of Controlled Dangerous Substance, Burglary First Degree.

Category C - Embezzlement, Burglary Second Degree, Possession of Controlled Dangerous Substance.

Category D - False and Bogus Checks, Larceny of Merchandise From a Retailer, Grand Larceny.

Inmates serving time for murder first degree and sex offenses (excluding indecent exposure), and those with Category A offenses scoring high risk do not receive presumptive parole dates. These inmates are considered at one-third of the sentence by Board policy.

Unless an inmate must serve a mandatory term by law before parole, he or she is docketed at the earlier of the PPD or one-third. The docket date is set for two months prior to the actual one-third date or PPD, to allow time for the Governor's action. The docket date is not changed by time credits granted by the Department of Corrections.

If an inmate is not required by law to serve a certain period of time before consideration, a member of the Pardon and Parole Board may place the inmate on an earlier docket at his or her discretion.

Some inmates do not receive parole docket dates. Examples are inmates with death sentences, those serving a sentence of life without parole, those with less than 120 days left to serve and inmates on commutation dockets (discussed later in this brochure).

Consideration and recommendations

The Board considers many factors when deciding on a clemency recommendation. Among these are the nature of the offense, prior criminal history, prior history under supervision, the inmate's institutional record, program participation, and input from law enforcement officials, victims of the crime, victims' families and private citizens.

Not all inmates considered for parole personally appear before the Board. About half are considered by jacket review, a review of the investigator's report and, if necessary, the inmate's file.

There are standard conditions which each inmate placed on parole must follow. These include reporting to the parole officer promptly, reporting to the officer either in person or in writing (whichever the officer requires), reporting changes in address, employment or marital status, not leaving the state without prior permission, not associating with persons with prior criminal records, obeying all local, state and federal laws, and not carrying or possessing firearms.

The Board can recommend stipulations in addition to the standard conditions of parole. Examples of stipulations are

restitution, completion of vocational training and educational Programs, and participation in drug and alcohol treatment programs.

In order to be recommended for parole, an inmate must receive favorable votes from three Board members (a simple majority).

An inmate cannot be paroled by the Governor without first being recommended by the Pardon and Parole Board.

An inmate can waive (decline) parole consideration by signing a waiver form.

Parole in Absentia

A law passed during the 1987 session of the Oklahoma Legislature authorized the Board to consider inmates for parole who have Oklahoma convictions and are in prison in other state systems and the Federal Bureau of Prisons. This law is the basis for the parole in absentia program. This program was implemented in an effort to save the state the expense of picking up inmates who are suitable parole candidates and bringing them back to Oklahoma after the completion of the other system's sentence.

To qualify, an inmate must have an Oklahoma felony conviction being served concurrently with the sentence(s) from the other system. The inmate must apply for consideration by submitting a completed application form and other requested documents and information. Docket dates are determined in the same manner as for other paroles, based upon the date the inmate began serving the Oklahoma sentence.

Parole supervision

Inmates who are paroled are supervised by probation and parole officers of the Department at Corrections. If an inmate does not abide by the conditions and stipulations of parole, the parole can be revoked by the Governor and the inmate can be returned to prison.

Why parole?

The advantages of parole over other types of release are many. Offenders receive support and assistance in making the transition back into society. Community resources are available, and a parole officer can provide assistance. Also, the interests of the public are protected. Parole decisions are made in open meetings and citizens have the opportunity to support or protest the release before it occurs. Law enforcement officers in the area of residence are notified when an inmate is released on parole, and a parole officer monitors compliance with rules and conditions of parole.

Parole also has a three-level screening process. The investigator interviews the inmate and makes a recommendation for or against parole. The Pardon and Parole Board members review the investigation and recommendation, and make a recommendation of their own. If the inmate is recommended for parole, the Governor reviews the Board's recommendation and makes the final decision. The Board recommends an average of one inmate out of three considered for parole.

Other types of release

The vast majority of released inmates go into the community without supervision or monitoring. This is

primarily due to time credits awarded by the Department of Corrections.

Cap credits are applied to the sentences of every inmate who meets the eligibility criteria each time the law is invoked. The net result is that each inmate who gets these credits has 60 days less to serve each time they are applied.

Earned credits are awarded for work or program assignments. In addition, inmates can earn lump-sum credit awards of up to 120 days for completing certain programs. The vast majority of inmates released by earned credits and cap credits are not supervised after release.

One early release program, the Department of Corrections' House Arrest program, is administered completely by that agency, which has total control over how many inmates and which ones are released. The house arrest population level is frequently boosted during periods of especially high prison population.

Summary

Parole is a discretionary release, where inmates are considered on a case-by-case basis without regard for prison population levels. Parole was not intended to be a population control mechanism, and is not used as such in Oklahoma.

Parole is preferable over less discriminate release programs because more people are involved in the decision, more factors are considered in making the decision, the decision is not made with population reduction as the primary goal, and the inmate is not released into the community unsupervised.

PRE-PAROLE CONDITIONAL SUPERVISION

The Pre-Parole Conditional Supervision program (PPCS) was developed as an alternative to the house arrest program operated by the Department of Corrections. It was created by statute in the 1988 session of the Oklahoma Legislature. To be eligible for PPCS, an inmate must have served at least 15 percent of his or her sentence, and be within one year of the scheduled parole docket date.

PPCS inmates are supervised in the community by probation and parole officers of the Department of Corrections. The conditions are very similar to parole. If an inmate does not comply with the conditions, he or she can be removed from the program and brought back to prison. Since the program is intended to prepare the inmate for parole supervision, the inmate is removed from the program if he or she elects not to be considered for parole. All pre-paroles are decided by jacket review. Governor approval is not required for PPCS.

COMMUTATION

The special commutation program was developed at the request of Governor Henry Bellmon to help alleviate the overcrowding situation in the Department of Corrections. To be eligible for commutation, an inmate must be in prison for the first or second time, be serving a sentence of less than five years, and not have any cases or detainers for violent crimes to be served during the current incarceration. Docket dates are determined by sentence length.

If an inmate is commuted, the sentence is modified to immediate release from prison. Inmates who are eligible for commutation must choose between commutation and parole consideration, and are not considered for both. All

commutations are decided by jacket review. The Governor must approve commutations. The Governor commutes sentences by signing a proclamation which includes a list of the inmates whose sentences are to be commuted. This usually takes place approximately one week after the Board meeting.

PARDON

A pardon is a form of clemency for a person who has already been released from prison or has completed a suspended sentence. To be eligible, a person must have been convicted of a violation of Oklahoma law and finished serving all cases (or, in the case of a lengthy sentence, completed at least five years under supervision). The applicant cannot have any pending charges, or have been considered for a pardon within the past six months.

Pre-pardon investigations are conducted by probation and parole officers of the Department of Corrections. The Pardon and Parole Board staff processes applications, reviews the final reports and tracks deadlines.

Effects of a pardon

A pardon restores certain rights (such as running for public office or serving on a jury). It may also have a positive impact on a licensing agency or prospective employer which normally does not consider convicted felons, or does so only on a case-by-case basis. Under Oklahoma law, a pardon does not remove convictions from a felony record, and does not prevent their use in the determination of punishment if the person is later convicted of another felony. A pardon also does not restore the right to carry firearms.

FACTS AND INFORMATION

The Pardon and Parole Board is an independent state agency. It is not part of the Department of Corrections or any other state agency.

The Pardon and Parole Board does not supervise parolees or probationers. Those services are provided by the Division of Probation and Parole of the Department of Corrections.

Of the inmates released from prison each year, only a small percentage are released on parole. The majority discharge without supervision due to time credits granted by the Department of Corrections.

Parole recommendation rates are lower than in the past. There are several reasons for this. A slight majority of the inmates considered for parole are serving time for violent crimes. In the past, a large number of non-violent offenders were considered. Alternative release programs which target non-violent offenders are also partially responsible for this trend. Many of the more suitable parole candidates are waiving consideration, electing instead to participate in programs like house arrest, or to discharge without supervision due to earned credits and cap credits.

Paroles are not automatic. The fact that an inmate is being considered does not mean that he or she will be released. The Board is required by law to consider inmates for parole, but is not required to recommend them. Inmates do not have a right to parole.

The Governor cannot parole, pardon or commute the sentence of an offender unless that person has been recommended for clemency by the Pardon and Parole Board.

Any citizen can support or protest the parole, pardon or commutation of an inmate. This can be done either by sending a letter to the Pardon and Parole Board office in Oklahoma City or appearing in person at the Board meeting.

Written protests are confidential, and are not revealed to anyone outside the agency. If a protestor appears in person at a meeting of the Pardon and Parole Board, great care is taken to ensure that the protestor and the inmate do no [sic] come in direct contact with one another. Anyone attending a Board meeting should be aware, however, that the meetings are open, and the confidentiality of any verbal statement cannot be guaranteed. The general public and news media attend the meetings, and the inmate may become aware of verbal statements made to the Board.

The information received by the Pardon and Parole Board does not normally contain the name and address of the victim of a crime. Due to this fact, the Board is usually unable to locate and notify victims in advance of an inmate's parole hearing unless that person sends a letter requesting to be notified in writing. Any person can request to be notified in advance when an inmate will be considered for parole by sending a letter to the Pardon and Parole Board office in Oklahoma City.

If an inmate is not required by law to serve a mandatory term before parole, each Board member has the authority to place that inmate on an earlier parole docket. Only members of the Pardon and Parole Board can do this. It cannot be done by the Governor, a congressman, a state legislator, an attorney or any member of the administrative staff

Once an inmate's parole docket date has been calculated, it does not change unless new information affecting time calculation is received or a Board member places the inmate

on an earlier docket. Earned credits and cap credits have no effect on the assigned docket date. The Pardon and Parole Board has no control over time credits granted to inmates.

District attorneys are required by law to provide a written version of the offense to the Board on sentences in excess of two years. These versions are included in the investigator's reports when available, and are considered by Board members when making clemency decisions.

Each district attorney receives a copy of the monthly docket prior to each month's meeting. All candidates for parole, commutation, pre-parole and pardon for that month are listed on the docket. District attorneys, county sheriffs and local police departments are also notified in writing of any inmate released on parole who either was convicted in or will reside in their area. District attorneys are also notified of persons who are pardoned.

The Pardon and Parole Board does not play any role in the assignment of security levels of inmates. The Board does not assign inmates to minimum or community security or house arrest. These decisions are made by the Department of Corrections.

The members of the Pardon and Parole Board do not maintain offices. Questions can be answered by staff members in the Administrative Office in Oklahoma City. Mail to Board members can be sent either to the Oklahoma City office or to the post office box each member has obtained for mail regarding parole matters.

THIS PUBLICATION, PRINTED BY THE OFFICE OF PUBLIC AFFAIRS, CENTRAL PRINTING DIVISION, IS ISSUED BY THE PARDON AND PAROLE BOARD AS AUTHORIZED BY RAY H. PAGE, EXECUTIVE DIRECTOR. A TOTAL OF 3,000 COPIES HAVE BEEN PREPARED AT A COST OF $1120.00. COPIES HAVE BEEN DEPOSITED WITH THE PUBLICATIONS CLEARINGHOUSE OF THE OKLAHOMA DEPARTMENT OF LIBRARIES.

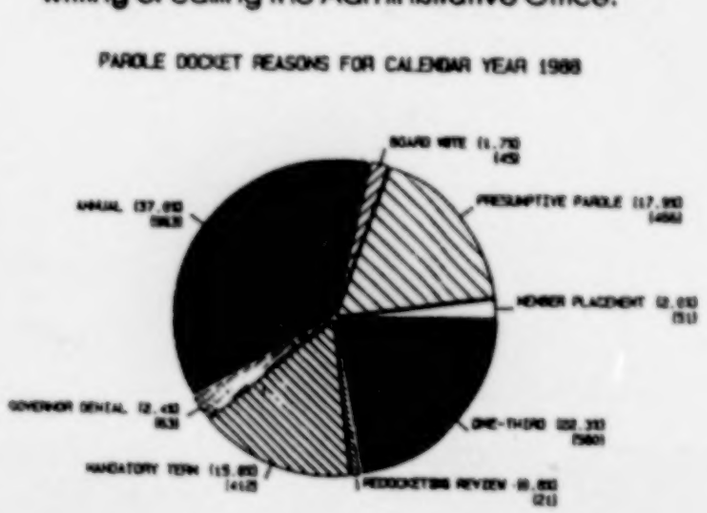
Administrative Office

Pardon and Parole Board
4040 North Lincoln Boulevard
Suite 219
Oklahoma City, OK 73105
Phone: (405) 427-8601

Office hours 8:00 AM to 5:00 PM
Monday thru Friday
(except state holidays)

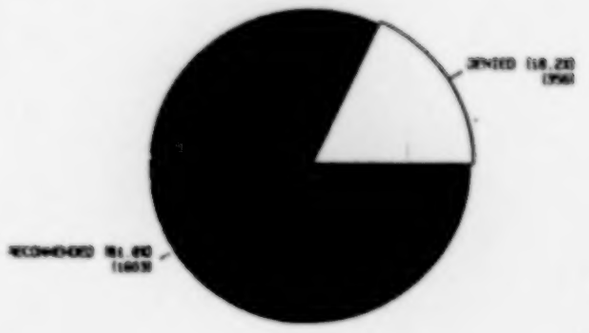
A listing of Board members' names and mailing addresses can be obtained by writing or calling the Administrative Office.

PAROLE DOCKET REASONS FOR CALENDAR YEAR 1988

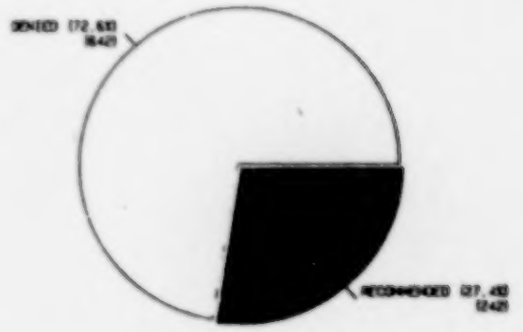


PAROLE RECOMMENDATIONS FOR CALENDAR YEAR 1988

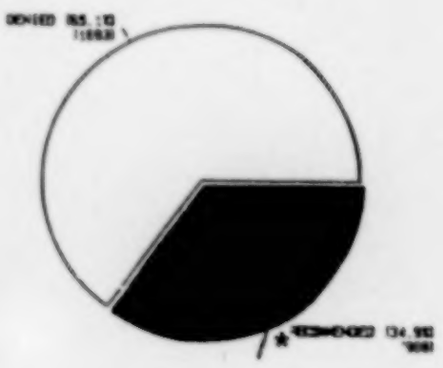
COMMUTATION RECOMMENDATIONS FOR CALENDAR YEAR 1988

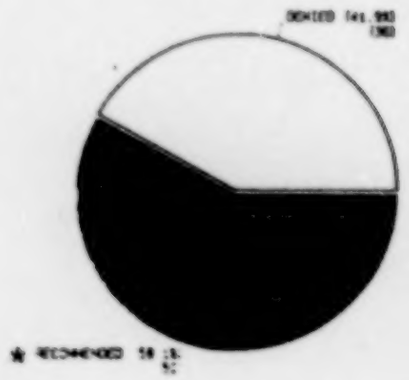


PRE-PAROLE RECOMMENDATIONS FOR CALENDAR YEAR 1988



PARDON RECOMMENDATIONS FOR CALENDAR YEAR 1988





*Text not legible in original document.

APPENDIX B

1992

STATE OF OKLAHOMA PARDON AND PAROLE BOARD

PARDON AND PAROLE BOARD

The Pardon and Parole Board is a constitutionally-created body charged with making clemency recommendations concerning convicted adult felons. Their recommendations are subject to approval by the Governor (with the exception of pre-parole conditional supervision, described below). The five members serve four-year terms coterminous with the Governor. Three members are appointed by the Governor, one member by the State Supreme Court, and one member by the Court of Criminal Appeals. There are no statutory qualifications, so the members come from all walks of life. The members serve part-time, and are not state employees. Any attorney who serves on the Board is prohibited from practicing criminal law or being part of a law firm which practices criminal law during the term of service.

AGENCY STAFF

The agency has approximately 40 employees. These employees administer the daily operation of the agency, prepare reports to the Board and answer inquiries from public officials, the news media and the general public. The agency is headed by the Executive Director, who is responsible for the overall operation of the agency. The Executive Director is assisted by the Deputy Director. The General Counsel addresses legal issues facing the agency.

Reports and investigations on individual candidates for parole and preparole are compiled by investigators. These investigators have previous experience in corrections, and are assigned to correctional facilities throughout the state.

MEETINGS

The Pardon and Parole Board meets monthly to consider candidates for parole, pre-parole and pardon. The meetings are normally held over a three-day period beginning on Wednesday of the designated week. Meetings are open to the public, and are conducted in accordance with the Open Meeting Act. Meeting information may be obtained by writing to or calling the office listed at the end of this brochure.

How are inmates scheduled for parole consideration?

Parole docket dates are calculated in several ways. The most common initial docket is one-third of the sentence. By state law, each inmate must be considered for parole no later than one-third of the sentence (except escapees, inmates involved in riots, and certain robbery and racketeering offenders). Approximately 45 percent of the inmates considered for parole in 1991 were considered based upon one-third of the sentence or a mandatory term by state statute. The Board recommended 32.2 percent of the inmates considered on regular parole dockets in 1991.

One-third dates are calculated on a maximum sentence length of 45 years. Those with sentences in excess of 45 years (including life sentences) are calculated as 45-year sentences for docketing purposes. The maximum one-third date by policy is 15 years.

Inmates serving time for non-violent offenses and some violent offenses of lesser severity are assigned 15/12 (15 percent plus 12 months) dates. Inmates with severe violent offenses receive 15/24 (15 percent plus 24 months) dates. Examples are:

Violent offenses (15/24) - Kidnapping, Shooting With Intent to Kill, Manslaughter First Degree.

Violent/drug transaction offenses (15/12) - Robbery With Firearms, Distribution of

Controlled Dangerous Substance, Burglary First Degree.

Non-violent offenses (15/12) - Embezzlement, False and Bogus Checks, Grand Larceny.

Inmates serving time for murder first degree and sex offenses other than indecent exposure do not receive presumptive parole dates or 15/24 dates (whichever applies). These inmates are considered at one-third of the sentence by Board policy.

The 15/12 and 15/24 dates replaced the presumptive parole date (described below) effective September 1, 1989. This change was made in conjunction with the phasing out of the Department of Corrections' house arrest program. The goal was to make inmates eligible for placement in the pre-parole program at approximately the same time that they would have been eligible for house arrest.

The presumptive parole date (PPD) was established in an effort to compensate for sentencing disparities for some offenders in prison for the first or second time. The PPD matrix was derived by analyzing the average time served for different types of offenses. The PPD could be administratively modified if official information was received which demonstrated that the crime was more serious than the offense title would have indicated. The PPD applies to offenders who were received or rebilled to a consecutive case before September 1, 1989.

Unless state law requires an inmate to serve a mandatory term before parole, he or she is initially docketed at the earlier of the PPD, 15/12 or 15/24 (whichever applies), or one-third. The docket date is set for two months prior to the actual eligibility date to allow time for the Governor's action.

If an inmate is not required by law to serve a specified period of time before consideration, the Pardon and Parole Board may modify the inmate's docket date. Such

modifications are discretionary, and a majority vote is required. The Board may also vote not to reconsider parole on a case for a period of up to five years, or to reconsider a case early (the normal period is one year from denial). Board modifications accounted for 16.3 percent of the inmates considered for parole in 1991.

Some inmates do not receive parole docket dates. Examples are inmates with death sentences, those serving a sentence of life without parole, those with less than 120 days left to serve and inmates serving parole violation cases with less than 28 months to serve.

Consideration and recommendations

The Board considers many factors when deciding on clemency. Among these are the nature of the offense, prior criminal history, prior history on probation or parole, institutional record, program participation, and input from law enforcement officials, victims of the crime, victims' families and private citizens.

Not all candidates for parole personally appear before the Board. Many are considered by jacket review, a review of the investigator's report and, if necessary, the inmate's file. The Board also considers input from supporters and protestors who attend the meeting in person.

Each inmate placed under parole supervision must follow certain standard conditions. These include reporting to the parole officer promptly, reporting regularly either in person or in writing (whichever the officer requires), reporting changes in address, employment or marital status, not leaving the state without prior permission, not associating with persons with prior criminal records, obeying all local, state and federal laws, and not carrying or possessing firearms.

The Board can recommend stipulations in addition to the standard conditions of parole. Examples of stipulations are restitution, completion of vocational training and educational

programs, participation in drug and alcohol treatment programs, community service and payment to the Crime Victims' Compensation Fund.

In order to be recommended for parole, and inmate must receive favorable votes from three Board members (a simple majority).

An inmate cannot be paroled by the Governor without first being recommended by the Pardons and Parole Board.

An inmate may decline parole consideration by signing a waiver form.

The Board may hold clemency hearings on death penalty cases. These meetings are held at the discretion of the chairman, and are usually conducted only when the executive date is near. Any recommendations for clemency made at such a hearing is subject to approval by the Governor.

Parole in absentia

The parole in absentia program, authorized by statute in 1987, allows inmates serving Oklahoma sentences along with cases in another prison system to be considered for parole without returning to Oklahoma. The program was implemented to save the expense of returning suitable parole candidates to Oklahoma after the completion of the other system's sentence. Inmates must apply for in absentia parole consideration.

The Oklahoma felony conviction must be running concurrently with the sentence(s) from the other system. Docket dates are calculated in the same manner as for other paroles, based upon the date the inmate began serving the Oklahoma sentence.

Parole supervision

Inmates who are paroled are supervised by probation and parole officers of the Department of Corrections. If an

inmate does not abide by the conditions and stipulations of parole, the parole can be revoked by the Governor and the inmate can be returned to prison.

Why parole?

Under parole supervision, offenders receive support and assistance in making the transition from prison to society. Community resources are available, and the supervising officer can provide help in locating and using them. The interests of the public are also protected. Law enforcement officers in the area of residence are notified when an inmate is released on parole, and a parole officer monitors compliance with rules and conditions of parole.

Parole has a three-level screening process. The investigator reviews the file and interviews the inmate, and makes a recommendation for or against parole. The Pardon and Parole Board members review the investigation and recommendation, and make a recommendation of their own. If the inmate is recommended for parole, the Governor reviews the Board's recommendation and makes the final decision.

Emergency time credits (cap credits) are applied to the sentence of each inmate who meets the eligibility criteria each time the law is invoked. The net result is that each inmate who gets these credits has 30 days less to serve each time they are applied.

Earned credits are awarded for work or program assignments. Inmates can also earn achievement credits, lump-sum credit awards of up to 120 days for completing certain programs. The vast majority of inmates released by earned credits and cap credits are not supervised after release.

Parole is a discretionary release. Inmates are considered on a case-by-case basis without regard for prison population levels. Parole was not intended to be used as a population control mechanism, and is not in Oklahoma.

Parole is preferable over less discriminate release programs because more people are involved in the decision, more factors are considered, population reductions is not the primary goal, and the inmate is not released into the community unsupervised.

PRE-PAROLE CONDITIONAL SUPERVISION

The Pre-Parole Conditional Supervision program (PPCS) was created by statute in the 1988 session of the Oklahoma Legislature. To be eligible for PPCS, an inmate must have served at least 15 percent of the sentence, and be within one year of the scheduled parole docket date. Inmates with consecutive cases and detainers are not considered for PPCS. PPCS inmates are supervised in the community by probation and parole officers of the Department of Corrections. The conditions are similar to parole. If an inmate does not comply with the conditions, he or she can be removed from the program and returned to prison. Since the program is intended to prepare the inmate for parole supervision, the inmate is removed from the program if he or she chooses not to be considered for parole. All pre-paroles are decided by jacket review. Governor approval is not required for PPCS. The Board recommended 41.2 percent of the inmates considered for PPCS in 1991.

Mandatory Parole Review Docket

A law passed in the 1989 session of the Oklahoma Legislature created the mandatory parole review docket (MPRD). Under this program, inmates who are serving time for non-violent offenses and are projected to discharge within 15 to 21 months (depending upon sentence length) are considered for parole. Inmates on the MPRD are considered

by jacket review. The Board recommended 62.8 percent of the inmates considered on the MPRD in 1991.

Pardon

A pardon is a form of clemency for a person who has been discharged from prison or has completed a suspended sentence or parole. Applicants must have been convicted of a violation of Oklahoma law and have finished serving all cases or have completed at least five years under supervision. The applicant cannot be in prison or jail, have any pending charges, or have been considered for a pardon within the past six months.

Pre-pardon investigations are conducted by probation and parole officers of the Department of Corrections. The Pardon and Parole Board staff processes applications, reviews the final reports and tracks deadlines.

A pardon restores certain rights (such as running for public office or serving on a jury). It may also have a positive impact on a licensing agency or prospective employer. Under Oklahoma law, a pardon does not remove convictions from a person's record, and does not prevent their use in sentencing if the person is later convicted of another felony. A pardon also does not restore the right to carry firearms. The 1991 approval rate for pardons was 60.0 percent.

PRISON OVERCROWDING

Traditionally, the Pardon and Parole Board played only a minor role in the control of prison population. Unprecedented growth in prison receptions and population forced a change in this regard. A unique joint effort between the Pardon and Parole Board and the Department of Corrections was undertaken in 1989 in an effort to establish a degree of control over the number of inmates in the prison system. The

Prison Population Growth Task Force was created, comprised of staff from both agencies. The task force attempted to address the needs of both the prison system and the citizens of Oklahoma. Ideas were formulated to make the system more efficient by eliminating and combining competing and duplicate programs, streamlining the parole process and recommending sweeping changes in the operations of both agencies. Most of the proposals of the task force were implemented.

FACTS AND INFORMATION

The Pardon and Parole Board is an independent state agency. It is not part of the Department of Corrections or any other state agency.

The Pardon and Parole Board does not supervise parolees or probationers. Those services are provided by the Department of Corrections.

Paroles are not automatic. The fact that an inmate is being considered does not mean that release will occur. The Board is required by law to consider inmates for parole, but is not required to recommend them. Inmates do not have a right to parole.

The Governor cannot parole, pardon or commute the sentence of an offender unless that person has been recommended for clemency by the Pardon and Parole Board.

Any citizen can support or protest the parole, pre-parole or pardon of an inmate. This can be done either by sending a letter to the Pardon and Parole Board office in Oklahoma City or appearing in person at the Board meeting.

Written protests are confidential, and are not revealed to anyone outside the agency. If a protestor appears in person at a meeting of the Pardon and Parole Board, great care is taken to ensure that the protestor and the inmate do not come in direct contact with one another. Anyone attending a Board meeting should be aware, however, that the meetings are

open, and the confidentiality of any verbal statement cannot be guaranteed. The general public and news media attend the meetings, and the inmate may become aware of verbal statements made to the Board.

The Pardon and Parole Board does not normally receive the name and address of crime victims. Due to this fact, the Board is usually unable to locate and notify victims in advance of an inmate's parole hearing unless that person requests to be notified in writing. Any person can request advance notification by sending a letter to the Pardon and Parole Board office in Oklahoma City. A statute passed in 1989 requires the Board to notify crime victims after an inmate has been released on parole.

Once an inmate's parole docket date has been calculated, it is not affected by earned credits or cap credits.

District attorneys are required by law to provide a written version of the offense to the Board on sentences of more than two years. These are included in the investigators' reports when available, and are considered by Board members when making clemency decisions.

Each district attorney receives a copy of the docket prior to each month's meeting. All candidates for parole, pre-parole and pardon for that month are listed on the docket. District attorneys, county sheriffs and local police departments are also notified in writing of any inmate released on parole who either was convicted in or will reside in their area. District attorneys are also notified of persons who are pardoned

The Pardon and Parole Board does not play any role in the assignment of security levels or facility transfers of inmates. These decisions are made by the Department of Corrections.

The members of the Pardon and Parole Board do not maintain offices for Board business. Questions can be answered by staff members in the Administrative Office in Oklahoma City. Mail to Board members can be sent either to

the Oklahoma City office or to the post office box each member maintains for mail regarding parole matters.

Administrative Office

Pardon and Parole Board
4040 North Lincoln Boulevard
Suite 219
Oklahoma City, OK 73105
Phone: (405) 427-8601
Fax: (405) 427-6648

Office hours 8:00 AM to 5:00 PM
Monday-Friday (except state holidays)

APPENDIX C

FORM 005-1-A
(6-91)

PAROLE FACT SHEET

Parole is the conditional release of an inmate from prison, based upon the prisoner's agreement that (s)he will follow certain rules while on parole. To ensure compliance with parole rules, the parolee is monitored by a Probation and Parole Officer until supervision is terminated. If you are recommended for parole by the Pardon and Parole Board and approved by the Governor, you must sign a Parole Certificate agreeing to follow all the rules of parole. If you do not follow the rules or commit a crime while on parole, even after supervision has been terminated, you will be returned to prison and your parole will be revoked. Read the following rules very carefully and, if you are not willing to abide by the rules and conditions, inform the Investigator who interviews you.

STANDARD RULES AND CONDITIONS
(All parolees must follow these rules)

1. You must report to your parole officer and your employer immediately upon arrival at your destination.

2. You must obey all city, state and federal laws. You also cannot own or carry firearms or travel in a vehicle containing a firearm belonging to you or anyone else.

3. You must not leave the state to which you are paroled without the written permission of your officer, nor can

you leave the county without the consent of your officer or his/her district office.

4. You must, as directed by the parole officer, send a written report to your parole officer on the forms furnished by the officer, until your supervision is terminated. You must also report in person to your parole officer according to the schedule provided by your officer, and you must allow him/her to visit you at your home, work, or other convenient place.

5. You must immediately report in person, in writing or by telephone, any changes in your address, employment or marital status, and you must also immediately report any new arrests.

6. You cannot use or possess drugs, other than those legally prescribed by a physician. You cannot frequent or go on the premises of places where alcoholic beverages are consumed, including taverns, beer parlors, clubs, or group meetings or parties where alcoholic beverages are served.

7. You must not lie or misrepresent the truth to any member of the Pardon and Parole Board, its staff, any parole officers, or employees of their district offices, or any other official of the government.

8. You cannot associate with persons on parole or probation, or persons with criminal records, nor can you communicate with inmates of any penal institution, except members of your immediate family, unless your parole officer gives you permission because of your work or other good reason.

9. You must pay a parole fee of $20 per month to the Department of Corrections during active parole supervision, unless payment is waived due to hardship.

10. You must comply with all lawful directions issued by your supervising officer or any member of the Department of Corrections.

11. You are subject to search at any time or place, as is your vehicle and property under your control.

12. You must submit to urinalysis or any other substance abuse testing procedures as required by your parole officer.

In addition to the standard rules, special conditions of parole may be imposed by the Parole Board after it reviews your case. Special conditions are designed to meet the specific needs of the offender during parole and may include Alcoholics Anonymous, successful completion of a substance abuse program, drug counseling, psychological counseling, financial counseling, etc. Parolees may be required to parole to another state, or to remain outside the State of Oklahoma until the parole expires. Restitution may be ordered to be paid to the Department of Corrections which forwards it to the victim of the crime. Other rules and conditions may also be established by the Board. Failure to comply with the special rules and conditions of parole will also result in parole revocation.

The Board may also recommend parole to a consecutive case only or to a detainer only. Such a recommendation obligates you to complete any remaining parole period after serving your consecutive case or satisfying your detainer.

You will be informed of any special parole rules or conditions if you are recommended by the Board. The conditions will appear on the parole certificate; you must sign the certificate before you are released. You will be notified of any remaining parole obligation after completing a consecutive case or satisfying a detainer. Success or failure on parole depends upon you. Understanding and following the rules is your responsibility.

APPENDIX D

RULES AND CONDITIONS

PRE-PAROLE CONDITIONAL SUPERVISION/ ELECTRONIC MONITORING/SPECIALIZED SUPERVISION/HOUSE ARREST

1. I will report as directed to the orientation scheduled on the date, time, and place directed.

2. I will obey all city, state, and federal laws. I will not own or possess a firearm. Additionally, I will not travel in a vehicle or live in a residence containing a firearm belonging to me or anybody else. I understand that at any time or place, I am subject to search. In addition, my vehicle and any property under my control is subject to search.

3. I will not, under any circumstances, leave the state of Oklahoma. I understand that leaving the state will result in escape charges being filed against me. I must obtain permission before leaving my county of residence.

4. I will report as directed by my officer in person and in writing on the forms provided by my officer. I understand my officer will visit me at home, work, or any other place without restriction to time. I also understand that I may be required to wear an electronic security monitoring device and pay the cost for the use of this device.

5. I will not use or possess drugs other than those legally prescribed by a physician. I will not use alcohol nor go

onto the premises of places where alcoholic beverages are served, to include: beer parlors, taverns, clubs, group meetings, or parties where alcoholic beverages are served. I will submit to urinalysis or other forms of drug detection.

6. I understand that I am required to maintain full-time employment unless involved in an approved full-time educational/vocational program. If unemployed, I will be required to be actively searching for employment and provide verification of such to my officer.

7. I will pay program support fees of $20 per month payable only in cashier's check or money order to the Department of Corrections.

8. I will not apply for any public, private, or governmental assistance without prior written approval by my officer.

9. I understand that I am subject to curfew restrictions which will be determined by my officer. If requested, I will carry on my person at all times an itinerary approved by my officer in advance.

10. I will not enter into any charge accounts or credit applications for loans other than for educational expenses without approval by my officer.

11. I will comply with all lawful directives issued by my supervising officer or any member of the Department of Corrections.

12. I understand that if I cannot be located for a 24 hour period or fail to report to a Department of Corrections facility or probation and parole office, I will be considered escaped. I hereby waive all extradition rights

and agree to return to the state of Oklahoma and the Department of Corrections when directed.

13. I understand that waiving parole while on community supervision status will result in reclassification to higher security.

14. I will actively participate in the developed case plan and any subsequent amendments to the plan. Programs may include, but are not limited to:

a) Substance Abuse
b) Employment
c) Educational/ Vocational
d) Financial; i.e., court costs, restitution
e) Mental Health
f) CSSP
g) Other

15. I understand that removal from Specialized Supervision or the Electronic Monitoring Program for disciplinary reasons will prohibit any future consideration or assignment to the Specialized Supervision Program. Additionally, I understand that I cannot be considered for PPCS by the Pardon and Parole Board for 12 consecutive months after being removed from specialized supervision.

16. I will not associate with persons actively under any form of Department of Corrections supervision or with person [sic] who have a criminal record. I will not communicate with inmates or any penal institution, except members of my immediate family, unless given permission by my officer.

17. I understand that I am responsible for my own medical care and all medical expenses incurred by me upon my release to House Arrest, Pre-Parole Conditional

Supervision, the Electronic Monitoring Program, or Specialized Supervision.

18. I will promptly notify my officer of any status changes to include any contact with law enforcement and changes of residence.

19. Special conditions by the Pardon and Parole Board. ___

_____

_____

_____

_____ _____ _____

Offender/DOC No. Date Witness/Posititon

022023/FORMS DOC 022023 (R693)

APPENDIX E

Policy and Operations Manual Effective Date: 08/24/93
Probation and Parole OP-160120
Alternative to Incarceration Programs

Supervision Standards for Offenders Assigned to Alternative to Incarceration Programs

C. Medical

1. Screening

Prior to assignment to SSP/EMP, inmates will be screened by the health services unit of the sending facility. Only those inmates cleared by health services may be placed in the community. Inmates with pending medical or dental appointments will not be placed in the community until they have attended the appointments and are cleared by the medical unit, unless waived by the medical services administrator.

2. Inmate Responsibility

Once placed under community supervision, inmates will be financially responsible for all medical health care. This will include any cost incurred for emergency care.

APPENDIX F

PARDON AND PAROLE BOARD

PROCEDURE 004-11

EFFECTIVE 4/1/94

I. TITLE: Pre-Parole Conditional Supervision

II. PROCEDURE: The Executive Director will assist the Pardon and Parole Board in the consideration of inmates for pre-parole conditional supervision (PPCS) as required by law, and will issue criteria for consideration. Pre-parole conditional supervision is utilized when capacity at Department of Corrections institutions is 92 1/2 percent or above, and will continue until 92 1/2 percent capacity is reached.

A. The Executive Director will issue criteria for PPCS consideration as directed by the Pardon and Parole Board.

1. Criteria are based upon time served and parole eligibility. Criteria will be adjusted as necessary to reduce prison population. Statutory criteria for PPCS include:

a. Minimum of 15 percent of the sentence served by time of release on PPCS

b. Within one year of initial parole consideration (regular parole docket)

c. Within 21 months of projected discharge.

2. Administrative criteria include all except the following:

a. Inmates with consecutive cases or detainers

b. Death sentences

c. Sentences of life without parole

d. Controlling case for parole violation (eligible with concurrent cases other than parole violations)

e. Returned escapees, if the scheduled PPCS docket is within one year of the date of return from escape

3. The following guidelines apply to the calculation of PPCS dockets:

a. Must have served at least 15 percent of all controlling and concurrent cases, and be within 2-13 months of the regularly scheduled docket date.

b. For indeterminate sentences, the 15 percent date will be calculated on the maximum sentence.

4. Inmates will only be considered once for PPCS. Consideration will occur prior to initial parole consideration.

5. A period of PPCS participation prior to parole may be imposed as a condition of parole if the inmate is eligible.

6. Inmates denied by the Board will be considered for parole on the regularly scheduled docket.

7. Inmates returned from the Specialized Supervision Program are ineligible for PPCS placement for a period of one year from the date of return by state law.

8. Parole certificates will be sent to the Governor for signature at the parole docket date without further Board action. If the inmate is subject to a mandatory term, this will occur at the parole eligibility date.

9. Inmates denied parole by the Governor while on PPCS will remain on the program, unless returned to higher security by due process.

10. The Executive Director will coordinate the completion of PPCS reports.

    a. Investigators will provide reports on each inmate eligible for PPCS. Reports will comply with the requirements of Procedure 006-2.

    b. Investigators will verify the accuracy and completeness of information with the file. The

report will be forwarded to the appropriate personnel by the appropriate deadline.

c. Inmates projected to discharge within two weeks of consideration will be stricken from the docket.

d. If the inmate is ineligible for PPCS, the investigator will send a memo to the Deputy Director with a recommendation that the inmate be removed from the docket.

III. BASIS FOR PROCEDURE:

A. Pardon and Parole Board Policy 004-Docketing criteria.

B. 57 O.S. 365.

C. To provide guidelines for consideration for pre-parole conditional supervision.

(Signed) 4-6-94

JARI ASKINS, EXECUTIVE DIRECTOR — DATE

APPENDIX G

Daily Oklahoman
May 29, 1996

High Court to Decide State Preparole Case

By Chris Casteel
Washington Bureau

WASHINGTON - The U.S. Supreme Court agreed Tuesday to decide whether Oklahoma can remove a prison inmate from the state's preparole program without giving written notice and holding hearings.

The case, which will be heard in the court term that begins in October, concerns convicted murderer Ernest Eugene Harper, who was put in Oklahoma's preparole program in 1990.

Harper was denied parole in 1991, and his status in the preparole program was revoked with five hours verbal notice and without any hearings. There was no evidence that he misbehaved while out on preparole.

The 10th U.S. Circuit Court Of Appeals in Denver ruled last year that Harper's participation in the preparole program gave him a "liberty interest" that entitled him to due process before that liberty was taken away.

Oklahoma Attorney General Drew Edmondson asked the U.S. Supreme Court to hear the case, arguing that appeals courts were split on the issue of whether preparole programs were more similar to parole or to minimum-security imprisonment.

Harper contends the program is more similar to parole -- which can only be revoked after some official proceedings -- while the state argues it is more akin to imprisonment and is just a different type of confinement.

Oklahoma uses the preparole program as a way to reduce prison crowding. According to a brief filed by Edmondson's office, the only similarities between parole and preparole "are that the inmate is allowed to work outside of the correctional facility and may reside in his own home."

Inmates in the program remain in the Corrections Department's custody and are aware that they can be removed if they are denied parole or if rules and conditions are violated, the attorney general's office said.

The Oklahoma Court of Criminal Appeals and U.S. District Judge Thomas R. Brett ruled against Harper. Brett ruled that Harper didn't have a liberty interest under the U.S. Constitution or state law in remaining in the preparole program.

But the 10th Circuit Court of Appeals reversed Brett's ruling, saying the preparole program gave Harper the same procedural protections that parolees are entitled to under a 1972 high court decision, Morrissey vs. Brewer.

Under the Morrissey standard, parolees must get written notice of claimed violations, disclosure of the evidence against them, the opportunity to be heard in person and present witnesses and documentary evidence, the right to confront and cross-examine adverse witnesses, and a neutral and detached hearing body such as a traditional parole board.

The 10th Circuit court said that the point where an inmate has a liberty interest protected by due process requirements comes when he's released from prison.

"The liberty associated with a life outside the walls of a penal facility dwarfs that available to an inmate," the 10th Circuit court wrote.

"It is the ability to reside in a home of one's own, without bars or fences or bonds, beyond the immediate authority of guards or wardens."

Harper originally received the death penalty in 1975 for killing a Tulsa County woman and her daughter. His sentence later was modified to life in prison.

Corrections Department spokesman Jerry Massie said most preparole inmates who are turned down for full parole are allowed to remain out of prison.

"I would suspect that his crime had something to do" with Harper's removal from the program, Massie said.

Harper is at the James Crabtree Correctional Center, a medium security prison at Helena.

Generally when an inmate on preparole is denied a full parole, it is because of the governor's objection, said Terry Jenks, executive director of the state Pardon and Parole Board.

He said the board normally doesn't even vote on well-behaved preparole inmates when their regular parole hearing arrives.

"As long as the person continues to do what they're supposed to be doing, the board pretty much sends that file on to the governor without looking at it," Jenks said.

The Harper appeal prompted state authorities to stop automatically returning preparole inmates to prison when they are rejected for full parole, Jenks and Massie said.

APPENDIX H

PARDON AND PAROLE BOARD PROCEDURE

NUMBER 004-11
EFFECTIVE 9-1-89

I. TITLE: Pre-Parole Conditional Supervision (PPCS)

II. PROCEDURE: The Executive Director shall assist the Pardon and Parole Board to consider inmates for pre-parole conditional supervision as required by law and shall issue criteria for consideration. Pre-parole conditional supervision is utilized when capacity at Department of Corrections institutions is ninety-two and one-half (92½%) percent or above and will continue until ninety-two and one-half (92½%) capacity is reached.

A. As directed by the Pardon and Parole Board, the Executive Director shall issue criteria for consideration of qualified inmates for pre-parole conditional supervision.

1. The Executive Director shall issue criteria for the selection of inmates and eligibility based on the amount of time served and the parole eligibility date. Criteria shall be periodically adjusted as needed to reduce the prison population through early release. Statutory criteria for pre-parole conditional supervision eligibility include:

a. Inmate must have served fifteen (15%) percent of sentence by time of release on PPCS.

b. Inmate must be within one (1) year of the regularly scheduled initial parole consideration.

c. Also, inmates who are within one (1) year of their projected release date.

2. Administrative criteria for pre-parole conditional supervision eligibility shall include all except the following:

a. Inmates who have consecutive cases.

b. Inmates serving death sentences.

c. Inmates serving life without parole.

d. Inmates scheduled for commutation consideration.

e. Inmates serving a parole violation.

f. Inmates who are escapees on annual dockets.

3. The following guidelines shall apply to the calculation of pre-parole conditional supervision dockets:

a. Inmates must have served 15% of their time and be within thirteen (13) months of their regularly scheduled docket date.

b. For those inmates who are serving indeterminate sentences, the fifteen (15%) percent shall be calculated on the maximum rather than the minimum sentence.

4. Inmates eligible for this program shall only be considered once prior to parole consideration.

5. At an inmate's regularly scheduled docket it may be recommended that the inmate participate in the PPCS program prior to parole.

6. Inmates who are not recommended by the Board will be considered for parole on the regularly scheduled docket.

7. Inmates who are placed on PPCS and successfully completes [sic] six (6) months will automatically be recommended for parole to the Governor at that time, or if serving a mandatory term will be recommended at that time.

8. The Executive Director shall coordinate the responsibilities of investigators for the preparation of pre-parole

conditional supervision reports with the parole coordinator for the Department of Corrections.

a. The investigators will provide a report for each inmate eligible for pre-parole conditional supervision. The pre-parole report shall follow the definitions for investigative reports as defined in Procedure 006-2 and shall include:

(1) Docket month and year

(2) Parole docket date/reason

(3) Inmate's facility (abbreviation)

(4) Name of person preparing the form

(5) Date prepared

(6) Inmate's name

(7) DOC number

(8) Date of birth/age

(9) Sex

(10) Controlling offense

(11) Sentence length

(12) County of conviction

(13) Felony case number

(14) Reception/rebill date

(15) Jail time

(16) Offense history

(17) Current release date

(18) Projected release date

(19) Number of prior incarcerations

(20) Security level

(21) Concurrent and/or consecutive cases or detainers

(22) Chronology of other felony convictions

(23) Official version of offense as indicated by a documented source

(24) Inmate's version of instant offense

(25) Institutional assignments and transfers

(26) Institutional disciplinary record

(27) Institutional participation program

(28) Institutional work performance

(29) Pre-parole plan

(30) Evaluation of previous adult community supervision and deferred sentences

(31) Juvenile institutionalization/supervision

(32) Substance abuse and mental health history and treatment

(33) Evaluation of disciplinary record

(34) Personal and family information

(35) Miscellaneous

(36) Recommendation

(37) Rationale and documentation or relevant comments supporting the recommendation, and any program stipulations. (Stipulated programs to be completed prior to or following release.)

b. Investigators shall verify the accuracy and completeness of information with the file. The report shall be forwarded to the appropriate personnel as required by the deadline schedule.

c. If the inmate is found to be ineligible for pre-parole, the investigator shall send a memo to the Deputy Director with a recommendation that said inmate be removed from the PPCS docket.

III. BASIS FOR PROCEDURE:

A. Pardon and Parole Board Policy 004 - Establishment of docketing criteria for consideration of paroles, pre-parole conditional supervision, sentence commutations, leaves of absence and pardons.

B. To ensure compliance with 57 O.S. Supplement 1988 § 577 requiring pre-parole conditional supervision.

C. To provide guidelines for considering pre-parole conditional supervision to reduce prison crowding.

DATE APPROVED: 9-1-89

(signed)
RAY H. PAGE,
EXECUTIVE DIRECTOR

APPENDIX I

Policy and Operations Manual — Effective Date: 10/29/92
Classification and Case Management — OP-060208
Pre-Parole Revocation Procedures

Interim Pre-Parole Conditional Supervision Revocation Procedu

The pre-parole conditional supervision revocation process consists of two parts. The first part determines whether or not probable cause exists. If probable cause is determined to exist, the second part consists of the PPCS Revocation Hearing and/or review and decision by the PPCS revocation review officer.

I. Initiating Procedures

A. Violation of Rules and Conditions

In the event the supervising officer detects a violation and further deems the pre-parole conditional supervision (PPCS) offender a threat to the community or an escape risk, with the approval of the district supervisor, the officer will apprehend and detain the offender, and the revocation process will be initiated. Normally, a violation report will be submitted to the district supervisor prior to the apprehension of the offender. Anytime an offender is arrested on felony charges or escapes, a copy of the Serious Incident/Media Attention Information Sheet (DOC

APPENDIX I

Form 050005 Attached) will be sent to the Parole Process Coordinator. Each district will ensure an impartial hearing officer is assigned to the case. Senior probation and parole officers, senior case managers, probation and parole team supervisors, assistant district supervisors, and case manager supervisors may be designated as hearing officers.

B. Supervising Officer Responsibilities

1. The supervising officer will submit court documents such as a certified district attorney's information sheet and a certified Judgement and Sentence indicating a crime occurred subsequent to the date of pre-parole placement (when that is the only allegation) to the hearing officer attached to a Pre-Parole Conditional Supervision Notice of Finding of Probable Cause (DOC Form 024071). This will constitute prima facie evidence that a violation of PPCS has occurred. A violation of city, state, or federal law will be documented as to date the offense occurred and a resulting conviction.

2. A hearing officer, finding probable cause, will sign and date the Pre-Parole Conditional

APPENDIX I

Supervision Notice of Finding of Probable Cause (DOC Form 024071) and return to the supervising officer for delivery to the offender.

3. The supervising officer will prepare a PPCS Notice of Probable Cause Hearing (DOC Form 022024 Attached) when any technical violations are alleged.

4. PPCS Notice of Finding of Probable Cause (DOC Form 024071), Notice of PPCS Revocation Hearing (DOC Form 022025), and PPCS Notice of Probable Cause Hearing (DOC Form 022024) will be completed as follows by the supervising officer:

   a. Offender's full name and DOC number as it appears on the offender's Consolidated Record Card.

   b. All case numbers and county of conviction subject to revocation will be entered.

   c. Allegations: Specify the rule number (as appears on the rules and conditions of house arrest/pre-parole conditional supervision) and

APPENDIX I

how the offender allegedly violated such condition of PPCS. Be specific in describing what resulted in the rule violation(s), include dates, case numbers, amounts of monies owed, and other evidence to be presented on PPCS notices of probable cause hearing.

5. The supervising officer will prepare all hearing notices and ensure any related documents such as information sheet(s) and Judgement and Sentence(s) are attached. Three sets of notices will be prepared and reviewed by the officer's immediate supervisor and/or the assistant district supervisor, prior to service to the offender.

6. The Notice of Finding of Probable Cause (DOC Form 024071) or Notice of Probable Cause Hearing (DOC Form 022024) will be delivered and Probable Cause Hearing will be completed if required within 48 hours of apprehension excluding weekends and holidays. The hearing will not be held less than 24 hours following notification to the offender. The hearing will be held in or near the community where the violation is alleged to have occurred or where the offender has been taken into custody.

APPENDIX I

7. The Notice of PPCS Revocation Hearing (DOC Form 022025), will be prepared by the supervising officer for delivery to the offender in conjunction with the PPCS Notice of Finding of Probable Cause (DOC Form 024071) or PPCS Notice of Probable Cause Hearing (DOC Form 122024). This notice will be served in the event that a PPCS Finding of Probable Cause (DOC Form 022024) has been made or in the event the offender waives the probable cause hearing. If the offender desires a Probable Cause Hearing, the Notice of Pre-Parole Conditional Supervision Revocation Hearing (DOC Form 022025) will be reserved for service at the conclusion of the Probable Cause Hearing.

8. Three sets of notices will be delivered, signed, witnessed, and dated. The officer delivering the notice will read the notices to the offender and will allow the offender to ask questions if necessary. Any waiver will be done only after it is evident that the offender understands the consequences of such an act (as explained on the documents). If the offender is illiterate, the notices and any attachments will be explained before the offender makes a decision. If the offender does not

APPENDIX I

understand English, the notices and any attachments will be interpreted into a language the offender understands. The officer will not make a recommendation to the offender as to whether or not to waive one or both hearings, or make any statement which could later be construed as an inducement to waive.

9. One set of hearing notices will be given to the offender, one to the hearing officer (if necessary), and one set is placed in the field file. All certified documents relating to the allegations of PPCS violation will be retained with the set of notices that are placed in the field file. The offender will be advised of the two part hearing process. At the Probable Cause Hearing, evidence concerning whether or not probable cause to believe a violation has occurred will be considered. The Pre-Parole Conditional Supervision Revocation Hearing is held only if probable cause has been found that there has been a violation of PPCS. The PPCS Revocation Hearing may result in finding that a violation occurred and a recommendation to the PPCS Revocation Review Officer for or against PPCS revocation.

APPENDIX I

Mitigation may be considered during the PPCS Revocation Hearing.

10. The offender will be advised of:

a. The offender will be allowed to retain private attorney, request staff representative, or any other approved persons. Representation participation may include (but will not be limited to) cross-examination of witnesses, examination/presentation of evidence, procedural objections, and/or speaking on behalf of offender.

b. The right to know allegations (this limits evidence to those specific allegations listed on the PPCS Notice of Probable Cause Hearing) (DOC Form 022024).

c. The right to confront adverse witnesses (this will require presence of all adverse witnesses as to technical violations in addition to police reports or violation reports).

APPENDIX I

II. Pre-Hearing Procedures

A. One of the primary purposes of providing the offender with the right to a hearing is to afford the offender an opportunity to confront and cross examine accusers. As set forth by Morrisey v. Brewer, it was established that this right existed unless the hearing officer finds "good cause" for not requiring the presence of the adverse witness. This decision required that any person who has given adverse information upon which the parole revocation is to be based will be made available for questioning in the presence of the offender, if so requested. The offender will be allowed to confront the adverse witness unless the hearing officer determines that there are substantial and compelling circumstances providing good cause for denying the request i.e., a witness could be subjected to risk of harm if identity is disclosed. (Such circumstances will be documented as part of the Probable Cause Hearing Report.)

1. The offender may retain private counsel or request a staff representative.

2. The hearing officer will decide whether or not to assign the offender a staff representative in order

APPENDIX I

Policy and Operations Manual Effective Date: 10/29/92
Classification and Case Management OP-060208
Pre-Parole Revocation Procedures

to assist the offender in defense of the allegations. The staff representative will be appointed where, in the opinion of the hearing officer, there is an inability for the offender to gather evidence, where the offender is incapable of making a defense, or where an interpreter is required. The hearing officer may allow the offender additional time for hearing preparation.

3. The staff representative will:

   a. consult with the offender before the hearing.

   b. explain the charge against the offender and the potential consequences.

   c. explain the ramification of a guilty plea.

   d. may assist the offender in investigating and presenting evidence in the offender's behalf.

   e. may represent the offender at the hearing.

   f. may question all witnesses, except confidential witnesses.

APPENDIX I

4. If the offender chooses to cancel the assistance of the staff representative, formal written waiver of staff assistance is required. If, in the judgement of the hearing officer and/or district supervisor, the offender is unable to knowingly and intelligently waive such assistance, the hearing officer and/or district supervisor will ensure that a staff representative is provided.

B. Evidence presented is not restricted to rules of evidence as in a courtroom situation. Weight and credence given to evidence or testimony presented is left to the hearing officer's judgement, but the reasons relied on for acceptance or rejection will be clearly stated.

C. The hearing officer will take all reasonable steps to preserve the confidentiality of the information by separating it from the rest of the record and clearly marking it confidential. The offender will be notified if confidential information is considered, and also whether the information was relied on in making the decision.

D. If the hearing officer determines that the identity of a witness may subject the witness to risk of harm, the

APPENDIX I

witness need not be subjected to confrontation and cross-examination. The risk of harm may be demonstrated by an overt or covert threat to the witness, by implicit threats or by any circumstances which create a reasonable likelihood that harm would result. The hearing officer will inquire into facts and circumstances, document them, and make a specific finding in the record. If any part of this inquiry is done during the course of the hearing, with the offender and/or the offender's staff representative, extreme care must be taken by the hearing officer to avoid accidental or unwitting disclosure of the witness' identity.

E. Once the risk of harm has been documented, the hearing officer should adequately document the information to be provided by the witness, and should be satisfied with the reliability of the information. Because of the lack of confrontation and cross-examination by the offender, the hearing officer will be especially careful to scrutinize the evidence supplied by the witness. The best method is by a personal examination of the witness; alternatives are by an affidavit, statement signed by the witness, tape recording, or a witness present at the hearing who actually interviewed the confidential witness. The

APPENDIX I

more diluted the statements of the witness become, the less reliable the testimony and the more acute the lack of confrontation and cross-examination becomes.

F. At any time during this process, the PPCS Probable Cause Hearing or the PPCS Revocation Hearing may be delayed or postponed for good cause as deemed appropriate by the district supervisor and/or hearing officer. The offender will be notified in writing of the reason for delay.

G. The supervising officer will ensure security is maintained throughout the hearing. The supervising officer will ensure that the offender is restrained per policy and transported to and from the hearing room.

H. After all interested parties are present and security is preserved, the hearing officer will begin the hearing.

III. Conducting The PPCS Probable Cause Hearing

A. The hearing will be recorded in its entirety and the hearing officer will protect the record. Individuals will be admitted to the hearing based upon their contribution regarding the allegations. The hearing officer will ensure that each witness, prior to giving

APPENDIX I

testimony, states the name and relationship to the offender.

1. Begin taping

2. State offender's name, DOC #, case #(s), county, date, time, and place of hearing.

3. Identify hearing officer, offender, supervising officer, and all other parties present (attorneys, witnesses, security, observers, etc.).

"This proceeding is an administrative rather than a judicial function. The Probable Cause Hearing is part one of a two-part process as prescribed by the United States Supreme Court's decision in Morrisey v. Brewer (408 U.S. 4710) [sic]. As hearing officer, it is my responsibility to offer, as a result of the information supplied in the course of this hearing, a finding as to whether there is probable cause to believe the offender has committed a PPCS violation. I do not represent final authority. The PPCS revocation hearing officer will recommend, and the PPCS revocation review officer is the final authority in revoking PPCS."

APPENDIX I

"As set forth in Morrisey v. Brewer, and on this _____ day of _____, 19__, the state Oklahoma has scheduled this PPCS probable cause hearing to be conducted at _____ in _____ County, Oklahoma. Subject of this hearing is _____, # _____, whose PPCS was granted on the ____ day of _____, 19__ by the Director of the Department of Corrections after recommendation of the Pardon and Parole Board.

4. Officer Presents Offender's PPCS Rules and Conditions

"This signed document is evidence of this PPCS as agreement to the Rules and Conditions of PPCS contained therein. _____, #_____, please describe for the record this PPCS Rules Conditions, and acknowledge that your signature is true and correct."

a. If the offender REFUSES TO ACKNOWLEDGE SIGNATURE AND DOCUMENT, so indicate for the record and make a ruling as to the authenticity.

APPENDIX I

b. If offender ACKNOWLEDGES, state for the record "The PPCS Rules and Conditions document and signature thereon is ruled authentic."

5. The hearing officer states purpose of the hearing.

"The purpose of this hearing is to determine, by means of the information presented, if whether or not cause exists to believe that this offender violated the Rules and Conditions of PPCS."

6. Supervising Officer Submits PPCS Notification of Probable Cause Hearing (DOC Form 022024) to Hearing Officer at This Time

"Received at this time is a copy of the PPCS Notice of Probable Cause Hearing (DOC Form 022024) which informed the offender of the date, location and purpose of this hearing which was signed by the offender on the ____ day of _____, 19__, and witnessed."

"The alleged violations are as follows."

APPENDIX I

7. Read the allegations and note the offender's admission or denial of each allegation.

8. Read MIRANDA when questioning offender regarding any pending charges.

9. IF WITNESSES plan to testify, ask the following of each:

   a. "Name"

   b. "Relationship to offender/official position"

   c. "Did you hear the allegation as read aloud?"

10. "What does the state of Oklahoma have to present at this hearing to support the allegations?"

11. The supervising officer will answer: "I submit violation report dated _____ and supplementals and dates supported by the following evidence/testimony." Supervising officer will list and present physical/verbal testimony. All documents will be entered into evidence. Offender will be allowed to discredit

APPENDIX I

allegations and confront witnesses (if it will not put the witnesses in any danger). Each allegation will be reviewed separately . . . asking the offender to admit or deny each allegation.

12. Both the state and the offender will be allowed to present all evidence, witnesses, and cross-examine with regard to each allegation.

13. The hearing officer may ask questions for clarification and will encourage the offender to speak in self-defense, cross-examine witnesses, and review evidence.

14. After all evidence and testimony has been presented, call a SHORT RECESS. TURN OFF THE TAPE.

15. The hearing officer's obligation will be to make a determination regarding the Violation of Rules and Conditions of PPCS.

16. Complete PPCS Probable Cause Hearing Findings (DOC Form 024070), make two copies, original to offender. List allegations by

APPENDIX I

rule number and evidence relied on to support or disprove.

B. If probable cause exists, the hearing officer completes Probable Cause Hearing Findings (DOC Form 024070), reads the findings into the record, and give the original to the offender.

1. Begin taping

2. If probable cause does not exist, "Probable cause does not exist based on the evidence/testimony presented to me in this hearing. My recommendation will be forwarded to the district supervisor for further action. Your release is controlled by that authority."

3. If probable cause exists, the following explanation will be provided to the offender:

"You are entitled to an PPCS Revocation Hearing to determine (1) whether you have in fact violated the rules and conditions of PPCS and (2) whether your PPCS status will be revoked. The purpose of this hearing is to examine evidence, presented by the Department

APPENDIX I

of Corrections, that you have violated rules/conditions of PPCS. You have the right to representation, by your attorney, staff representative, or any other person. It is your responsibility to notify your witness of the date, time, and place of the hearing."

4. Issue Offender Notice of PPCS Revocation Hearing (DOC Form 022025) provided by supervising officer, requesting the offender indicate by check and initials whether or not the offender wants a PPCS Revocation Hearing or wishes to waive the hearing. The revocation hearing will not be held less than 48 hours following the finding of probable cause, excluding weekends and holidays. If the offender waives the 48-hour preparation time, the PPCS Revocation Hearing will be held immediately following the PPCS Probable Cause Hearing. Have the offender and witnesses sign and date the notices. The offender gets the original and two copies are returned to the supervising officer for distribution.

5. Terminate hearing--Turn off tape

APPENDIX I

IV. PPCS Revocation Hearing

A. The hearing will be recorded in its entirety and the hearing officer will protect the record. Individuals will be admitted to the hearing based upon their contribution regarding the allegations. The hearing officer will ensure that each witness, prior to giving testimony, states the name and relationship to the offender.

1. Begin taping

2. State offender's name, DOC #, cases #(s), county, date, time, and place of hearing.

3. Identify hearing officer, offender, supervising officer, and all other parties present (attorneys, witnesses, security, observers, etc.)

4. "This proceeding is an administrative rather than a judicial function. The Pre-Parole Conditional Supervision Revocation Hearing is part two of a two-part process as prescribed by the United States Supreme Court's decision in Morrisey v. Brewer (408 U.S. 4710). As hearing officer, it is my responsibility to review

APPENDIX I

evidence, testimony, and mitigating circumstances supplied in the course of this hearing regarding the alleged rule violations and to make a recommendation for or against revocation. I do not represent final authority. The PPCS Revocation Review Officer is the final authority for revoking PPCS."

5. "As set forth in Morrisey v. Brewer, and on this ____ day of _____, 19___, the state of Oklahoma has scheduled this PPCS Revocation Hearing to be conducted at _____ in _____ County, Oklahoma. Subject of this hearing is _____, #_____, whose Pre-Parole Conditional Supervision was granted on the _____ day of _____, 19____, by the director of the Department of Corrections after recommendation by the Pardon and Parole Board.

6. Officer Presents Offender's PPCS Rules and Conditions.

APPENDIX I

"This signed document is evidence of an agreement to the Rules and Conditions of PPCS contained therein. _____, #_____, please describe for the record, and acknowledge, these, your PPCS Rules and Conditions signature is true and correct."

a. If the offender REFUSES TO ACKNOWLEDGE SIGNATURE AND DOCUMENT, so indicate for the record and make a ruling as to the authenticity.

b. If offender ACKNOWLEDGES, STATE FOR THE RECORD, "The PPCS Rules and Conditions Document and signature thereon is ruled authentic."

7. "The purpose of this hearing is to determine by means of the information presented whether or not this offender violates the rules and conditions of PPCS taking into account mitigating circumstances. Following this hearing, a recommendation for or against revocation will be forwarded to the PPCS Revocation Review Officer.

APPENDIX I

8. Supervising Officer Submits Notice of PPCS Revocation Hearing (DOC Form 022925) to Hearing Officer at This Time

"Reviewed at this time is a copy of the Notification of PPCS Revocation Hearing which informed the offender of the date, location and purpose of this hearing which was signed by the offender on the __ day of _____, 19____, and witnessed."

"The alleged violations are as follows."

9. Read the allegations and note the offender's admission or denial of each allegation.

10. Read MIRANDA when questioning offender regarding any pending charges.

11. IF WITNESSES plan to testify, ask the following of each:

a. "Name"

b. "Relationship to offender/official position"

APPENDIX I

c. "Did you hear the allegation as read aloud?"

12. "What does the state of Oklahoma have to present at this hearing to support these allegations?"

13. The supervising officer will answer: "I submit violation report dated, _____ supplementals dated _____, and supported by the following evidence/testimony." Supervision officer will list and present physical/verbal testimony. All documents will be entered into evidence. Offender will be allowed to discredit allegations and confront witnesses (if it will not put the witnesses in any danger). Each allegation will be reviewed separately . . . asking the offender to admit or deny each allegation.

14. Both the state and the offender will be allowed to present all evidence, witnesses, and cross-examine with regard to each allegation.

15. The hearing officer may ask questions for clarification and will encourage the offender to

APPENDIX I

speak in self-defense, cross-examine witnesses, and review evidence.

16. "This PPCS Revocation Hearing is now complete. The evidence presented and all mitigating circumstances will be reviewed and a report detailing the findings along with recommendation either for or against revocation will be prepared by this hearing officer. This report and the evidence will be forwarded to the PPCS Revocation Review Officer for a final decision. A copy of the report will be forwarded to you at the facility where you are housed. You will be notified of the results of the hearing by the PPCS Revocation Review Officer as soon as available. If the decision is to revoke, the review officer will also inform you of the appeals process. An appeal cannot be filed until the final decision of the review officer."

V. Post Hearing Procedures

A. The PPCS Revocation hearing officer will compose summary as follows:

APPENDIX I

1. First paragraph--the date, approximate time of hearing, date, date offender notified of hearing. State if waiver of 48 hours was requested.

2. Second paragraph--names of witnesses and titles who appeared in behalf of pre-paroles.

3. Third paragraph--names of witnesses and tiles [sic] who appeared in behalf of state.

4. Fourth paragraph--opening of the hearing stating that offender acknowledged signature on the PPCS Rules and Conditions.

5. Paraphrase testimony of witnesses and describe any physical evidence of documents presented.

6. Closing paragraph--each allegation will be addressed separately as to whether or not a violation of PPCS has occurred and the reason(s) for such finding(s) should be clearly stated. This paragraph will include a recommendation for or against revocation of the offender's PPCS status.

APPENDIX I

Policy and Operations Manual Effective Date: 10/29/92
Classification and Case Management OP-060208
Pre-Parole Revocation Procedures

B. The probable cause and revocation hearing officers will identify cassette tapes for each hearing as follows:

   1. Offender name and number

   2. Date of hearing

   3. Location of hearing

C. The revocation hearing officer will submit tapes, documents, and evidence submitted for both hearings, and a revocation hearing summary to the district supervisor for review. The district supervisor will forward the material to the PPCS Revocation Review officer within five working days of the hearing. All evidence will be retained for 90 days after a decision is made by the PPCS Revocation Review Officer.

D. The district will ascertain the offender's status with regard to pending charges in order to notify proper authorities of availability to transport.

APPENDIX I

VI. PPCS Revocation Hearing File

A. The district supervisor will ensure the following components are completed and included in the PPCS Revocation Hearing file:

1. File will be labeled PPCS Revocation Hearing File, including offender's full name and DOC number.

2. Hearing notices

3. Hearing summary (if applicable)

4. All certified court documents and notarized affidavits introduced at the hearing

5. Copy of Probable Cause Hearing Findings (DOC Form 024070)

6. Copy of rules and conditions of PPCS

7. Violation report (and supplemental reports)

8. One year of chronologicals

APPENDIX I

9. Last assessment/reassessment

B. The PPCS Revocation Review Officer will ensure that the offender is notified of the hearing results.

VII. Duties of the PPCS Revocation Review Officer

A PPCS Revocation Review officer will be designated by each regional director. The review officer is the final decision maker in PPCS revocations and will ensure due process is followed in the revocation process as outlined in Morrisey v. Brewer.

A. Review the PPCS Revocation File, all documented evidence and the hearing tape to ensure due process has been followed and make a final determination for or against revocation.

B. The review officer may order a rehearing or order the release of the offender back to PPCS in cases where due process requirements were not properly met.

C. Notify the offender of the final decision. The offender will also be notified of the appeals process available through the courts.

APPENDIX I

D. Notify the Parole Process Coordinator of the results of the hearing by forwarding the hearing summary and final decision.

E. PPCS Revocation Review Officer's decision is final.

F. If the PPCS Revocation Review Officer's decision is against revocation, the Out-Count Unit will be notified for return of the offender to PPCS.

VIII. References

Morrisey [sic] v. Brewer 408 U.S. 4710 57 O.S. § 365

IX. Action

The regional director will be responsible for compliance with these procedures.

The deputy director, Offender Services, will be responsible for the annual review and revisions.

Any exceptions to this operations memorandum will require written approval from the director.

These procedures will be effective immediately after signing.

APPENDIX I

Distribution: Policy and Operations Manual

(signed) 10-29-92
Larry A. Fields, Director
Oklahoma Department of Corrections

OP060208/OPSSIGN/OPS060

PRE-PAROLE CONDITIONAL SUPERVISION
NOTICE OF FINDING OF PROBABLE CAUSE

Inmate _____ Number _____

Date Paroled _____ Discharge Date _____

Department of Corrections records indicate that you have been convicted of the following offense(s) during Pre-Parole Conditional Supervision during the term of PPCS on CRF-_____

OFFENSE	CASE NO.	JURISDICTION	DATE COMMITTED	DATE OF CONVICTION	SENTENCE

After Administrative review of PPCS violation reports, certified copies of information sheets, and certified copies of Judgment and Sentence documents pertaining to the above conviction(s), it has been determined that there is probable cause to believe that you have violated the following rules and conditions of PPCS:

RULE NO.	ALLEGED VIOLATION

You are therefore entitled to a PPCS Revocation Hearing to determine (1) whether you have in fact violated the rules and conditions of PPCS and (2) whether your PPCS should be revoked. You will be notified in writing of the date, time, and place of such hearing.

_____
Signature

_____
Title

_____
Date

_____ Signature of Inmate	_____ Number	_____ Date
_____ Signature of Witness	_____ Number	_____ Date
_____ Signature of Witness	_____ Number	_____ Date

DOC 024071 (10/92)

APPENDIX J

OKLAHOMA STATUTE

TITLE 57. PRISONS AND REFORMATORIES
CHAPTER 7. PARDONS AND PAROLES
PAROLE FUND AND RELATED MATTERS

Okla. Stat. tit. 57, § 365 (1995)

§365. Preparole Conditional Supervision Program

A. Whenever the population of the prison system is certified by the State Board of Corrections as exceeding ninety-five percent (95%) of its capacity, as defined in Section 571 of this title, the Department of Corrections and the Pardon and Parole Board shall implement a Preparole Conditional Supervision Program until such time as the population is reduced to ninety-two and one-half percent (92 1/2 %) of capacity, for persons in the custody of the Department of Corrections who meet the following guidelines:

1. Only inmates who are otherwise eligible for parole, pursuant to Sections 332.7 and 332.8 of this title, shall be eligible to participate in this program;

2. An inmate shall serve at least fifteen percent (15%) of his sentence of incarceration and be within one (1) year of his regularly scheduled parole consideration date or be within twenty-one (21) months of his projected release date, prior to being eligible for this program; and

3. Only inmates who have attained the proficiency level established by Section 3 of this act, unless exempted by said section, or who comply with education requirements as provided in subsection C of Section 4 of this act shall be eligible for participation in this program.

B. Upon an inmate becoming eligible for this program it shall be the duty of the Pardon and Parole Board, with or without application being made, to cause an examination to be made of the criminal record of the inmate and to make inquiry into the conduct and the record of said inmate during his confinement in the custody of the Department of Corrections.

C. Upon favorable recommendation by the Pardon and Parole Board, notification shall be made to the Department of Corrections that said inmate has been recommended to be placed in this program.

D. Prior to the placement of an inmate on Preparole Conditional Supervision, the Department shall provide written notification to the sheriff and district attorney of the county in which any person on Preparole Conditional Supervision is to be placed and to the chief law enforcement officer of any incorporated city or town in which said person is to be placed of the placement of the person on Preparole Conditional Supervision within the county or incorporated city or town. The Department also shall provide written notification of the placement of the person on Preparole Conditional Supervision within the county or incorporated city or town to any victim of the crime for which the inmate was convicted by mailing the notification to the last-known address of the victim, if such information is requested by the victim. The Department of Corrections shall not give the address of

the inmate to any victim of the crime for which the inmate was convicted.

E. Should an inmate violate any rule or condition during the period of community supervision, the inmate shall be subject to disciplinary proceedings as established by the Department of Corrections.

F. Any inmate who escapes from this program shall be subject to the provisions of Section 443 of Title 21 of the Oklahoma Statutes.

G. Any inmate who fails to satisfactorily attend and make satisfactory progress in the educational program in which the inmate has been required to participate as a condition of eligibility for this program shall have his or her eligibility for this program revoked. Any such inmate shall be returned to confinement in the custody of the Department of Corrections.

APPENDIX K

OKLAHOMA STATUTE

TITLE 57. PRISONS AND REFORMATORIES
CHAPTER 7. PARDONS AND PAROLES

Okla. Stat. tit. 57, § 332.7 (1995)

§ 332.7. Persons eligible for consideration for parole--Inquiry--Recommendation to Governor--Parole consideration date

A. Upon completion of one-third (1/3) of the sentence of any person in the custody of the Department of Corrections, such person shall be eligible for consideration for a parole, and it shall be the duty of the Pardon and Parole Board to cause an examination to be made at the penal institution where the person is assigned, and to make inquiry into the conduct and the record of the said person during his custody in the Department of Corrections, which shall be considered as a basis for consideration of said person for recommendation to the Governor for parole. However, the Pardon and Parole Board shall not be required to consider for parole any person who has completed one-third (1/3) of his sentence if the person has participated in a riot or in the taking of hostages, or has been placed on escape status, while in the custody of the Department of Corrections. The Pardon and Parole Board shall adopt policies and procedures governing parole consideration for such persons.

B. The Pardon and Parole Board shall not recommend to the Governor any person who has been convicted of three or more felonies arising out of separate and distinct

transactions, with three or more incarcerations for such felonies, unless such person shall have served the lesser of at least one-third (1/3) of the sentence imposed, or ten (10) years; provided that whenever the population of the prison system exceeds ninety-five percent (95%) of the capacity as certified by the State Board of Corrections, the Pardon and Parole Board may, at its discretion, recommend to the Governor for parole any person who is incarcerated for a nonviolent offense not involving injury to a person and who is within six (6) months of his or her statutory parole eligibility date.

C. Upon application of any person convicted and sentenced by a court of this state and relinquished to the custody of another state or federal authorities pursuant to Section 61.2 of Title 21 of the Oklahoma Statutes, the Pardon and Parole Board may determine a parole consideration date consistent with the provisions of this section and criteria established by the Pardon and Parole Board.

D. No person who is appearing out of the normal processing procedure shall be eligible for consideration for parole without the concurrence of at least three (3) members of the Pardon and Parole Board.

APPENDIX L

OKLAHOMA STATUTE

TITLE 57. PRISONS AND REFORMATORIES
CHAPTER 7. PARDONS AND PAROLES

Okla. Stat. tit. 57, § 332.8 (1995)

§ 332.8. Conditions for parole -- Employment and residence assistance

No recommendations to the Governor for parole shall be made in relation to any inmate in a penal institution in the State of Oklahoma unless the Pardon and Parole Board considers the victim impact statements if presented to the jury, or the judge in the event a jury was waived, at the time of sentencing and, in every appropriate case, as a condition of parole, monetary restitution of economic loss as defined by Section 991f of Title 22 of the Oklahoma Statutes, incurred by a victim of the crime for which the inmate was imprisoned. In every case, the Pardon and Parole Board shall first consider the number of previous felony convictions and the type of criminal violations leading to any such felony convictions, then shall consider either suitable employment or a suitable residence, and finally shall mandate participation in education programs to achieve the proficiency level established in Section 510.7 of this title or, at the discretion of the Board require the attainment of a general education diploma, as a condition for release on parole. The probation and parole officer shall render every reasonable assistance to any person making application for parole, in helping to obtain suitable employment or enrollment in an education program or a suitable residence. Any inmate who fails to satisfactorily attend and make satisfactory progress in the educational

program in which the inmate has been required to participate as a condition of eligibility for parole, shall have his or her eligibility for parole revoked. Any such inmate shall be returned to confinement in the custody of the Department of Corrections.

APPENDIX M

OKLAHOMA STATUTE
TITLE 57. PRISONS AND REFORMATORIES
CHAPTER 7. PARDONS AND PAROLES

Okla. Stat. tit. 57, § 350

§ 350. Deduction from sentence of time spent on parole--Revocation of parole

A. Every person, hereinafter referred to as "convict," who has been or who in the future may be sentenced to imprisonment in any state penal institution shall, in addition to any other deductions provided for by law, be entitled to a deduction from his sentence for all time during which he has been or may be on parole. The provisions of this section are hereby declared to be both retroactive and prospective, and to apply to convicts who are on parole on the effective date of this act as well as to convicts who may be paroled thereafter; and shall at the discretion of the paroling authority apply to time on a parole which has been or shall be revoked.

B. Beginning November 1, 1987, the paroling authority also shall have the discretion to revoke all or any portion of the parole.

APPENDIX N

TITLE 57. PRISONS AND REFORMATORIES
CHAPTER 8. OKLAHOMA CORRECTIONS ACT OF 1967

Okla. Stat. tit. 57, § 512 (1995)

§ 512. Supervision of inmates paroled from state institutions -- Conditions for release -- Violations

Any inmate in a state penal institution who has been granted a parole shall be released from the institution upon the following conditions:

1. That he comply with specified requirements of the Division of Community Services of the Department of Corrections under the active supervision of a Probation and Parole Officer. Such active supervision shall be for a period not to exceed three (3) years, except as provided in paragraph 2 of this section.

2. That he be actively supervised by a Probation and Parole Officer for an extended period not to exceed the expiration of the maximum term or terms for which he was sentenced if convicted of a sex offense or upon the determination by the Division of Community Services that the best interests of the public and the parolee will be served by such an extended period of supervision.

Provided, for the purposes of this section, the term "sex offense" shall not include a violation of

paragraph 1 of subsection A of Section 1021 of Title 21 of the Oklahoma Statutes.

The Probation and Parole Officer, upon information sufficient to give him reasonable grounds to believe that the parolee has violated the terms of and conditions of his parole, shall notify the Deputy Director of the Division of Community Services in accordance with Section 516 of Title 57 of the Oklahoma Statutes.

Supreme Court, U.S.
FILED
OCT 30 1996
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No. 95-1598

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

LEROY L. YOUNG and
ATTORNEY GENERAL OF OKLAHOMA,
Petitioners,

v.

ERNEST EUGENE HARPER,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

REPLY BRIEF OF PETITIONERS

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22 pp

TABLE OF CONTENTS

Page

PROPOSITION I

THE PETITION FOR WRIT OF CERTIORARI WAS TIMELY FILED AND CONSIDERED BY THE COURT OF APPEALS ON THE MERITS; THUS, THIS COURT HAS JURISDICTION TO HEAR THIS MATTER 1

A. The Petition for Rehearing was Timely Filed 1

B. The Petition for Rehearing was Reviewed on the Merits 6

PROPOSITION II

THE STATE DID NOT VIOLATE RESPONDENT'S DUE PROCESS RIGHTS WHEN RESPONDENT WAS RECLASSIFIED TO A HIGHER SECURITY LEVEL WHILE SERVING HIS JUDGMENT AND SENTENCE 9

CONCLUSION 15

TABLE OF AUTHORITIES

Cases Cited

Page

Application of Kenneth T. Snyder,
557 F.2d 820 (C.C.P.A. 1977) 3

Bowman v. Lopereno,
311 U.S. 262, 61 S. Ct. 201, 85 L. Ed. 177 ..... 7, 8

Denholm & McKay Co. v. Commission
of Internal Revenue,132 F.2d 243 (1st Cir. 1942) 6

Jones v. Cunningham,
371 U.S. 236 (1963) 14

Meachum v. Fano,
427 U.S. 215 (1976) 14

Missouri v. Jenkins,
495 U.S. 33 (1990) 4, 5

Morrissey v. Brewer,
408 U.S. 471 (1972) 9, 10, 12, 14

Pfister v. Northern Illinois Finance Corp.,
317 U.S. 144 (1942) 8

Spurlock v. State,
72 P.2d 731 (Okla. Crim. App. 1986) 13

Thurman v. State,
500 P.2d 1074 (Okla. Crim. App. 1972) 11

United States v. Seminole Nation, 1937,
299 U.S. 417, 57 S. Ct. 283, 81 L. Ed. 316 7

Statutes Cited

Okla. Stat. tit. 21, § 443 11

Okla. Stat. tit. 57, § 138 (Supp.1989) 11

Okla. Stat. tit. 57, § 332 (1991) 10

Okla. Stat. tit. 57, § 332.7 (Supp.1993) 10

Okla. Stat. tit. 57, § 350 (Supp.1987) 11

Okla. Stat. tit. 57, § 365 (Supp.1990) 10

Okla. Stat. tit. 57 § 365(E) (Supp.1990) 11, 13

Okla. Stat. tit. 57, § 365(F) (Supp.1993) 11

Okla. Stat. tit. 57, § 512 (Supp.1993) 12

Other Authority

Fed. R. App. P. 40(a) 3

Fed. R. App. P. 41(a) 3, 4

10th Cir. R. 40.3 ..... 3, 5

Sup. Ct. R. 13.3 5

No. 95-1598

IN THE
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LEROY L. YOUNG and
ATTORNEY GENERAL OF OKLAHOMA,
Petitioners,

v.

ERNEST EUGENE HARPER,
Respondent.

REPLY BRIEF OF PETITIONERS

PROPOSITION I

THE PETITION FOR WRIT OF CERTIORARI WAS TIMELY FILED AND CONSIDERED BY THE COURT OF APPEALS ON THE MERITS; THUS, THIS COURT HAS JURISDICTION TO HEAR THIS MATTER.

A. The Petition for Rehearing was Timely Filed.

The Respondent contends this Court lacks jurisdiction to hear this matter because the Petitioners' Petition for Rehearing and Suggestion for Rehearing *En Banc* ("Petition for Rehearing") filed in the United States Court of Appeals for the Tenth Circuit ("Court of Appeals") was untimely. Thus, the Respondent maintains the Petition for Rehearing did not toll the 90-day period for seeking certiorari by this Court. The Respondent neglects to consider the effect of the Order of the Court of Appeals dated September 25, 1995 and the actions taken by the Court of Appeals which reveal that the Petition for Rehearing was timely filed.

Initially, the Petitioners note that on September 25, 1995, an Order was entered by the Court of Appeals allowing the Petition for Rehearing to be filed. In addition, the Court of Appeals ordered that Respondent file a response to the Petition for Rehearing.[1] Fed. R. App. P. (40)(a) provides, in pertinent part:

> A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule.

[1] A copy of the Order of the Court of Appeals dated September 25, 1995 is reprinted at page 1a of the accompanying Appendix A to this Reply Brief ("Rep. App.").

Pursuant to 10th Cir. R. 40.3:

> In all other cases petitions for rehearing or suggestions for rehearing *en banc* shall be filed within 14 days after the entry of judgment. The time for filing a petition for rehearing or suggestion for rehearing *en banc* may be shortened by order of the court, but will not be extended except for good cause shown.

It is apparent by the actions of the Court of Appeals, in issuing an order allowing the filing of the Petitioners' Petition for Rehearing, that the Court of Appeals, *sua sponte,* found good cause for granting an extension to allow the filing of the Petition for Rehearing to be timely filed.[2]

It is also apparent, due to the failure of the mandate of the Court of Appeals to issue on or before September 20, 1995, that the Petition for Rehearing was timely filed. Fed. R. App. P. 41(a) provides, in pertinent part:

[2] The Petition for Rehearing reveals that the petition was mailed to Respondent on September 11, 1995. Thus, it can be presumed that the petition was also mailed for filing with the Court of Appeals on or before September 11, 1995. The petition, however, was not filed until September 15, 1995. Counsel for Petitioners deposited the petition in the United States mail at least two days prior to the date such petition was due. Perhaps the Court of Appeals realizing that counsel acted within the time frame allowed by Fed. R. App. P. 40(a) and 10th Cir. R. 40.3 granted the extension because it would have been unjust for the mandate to have issued. See Application of Kenneth T. Snyder, 557 F.2d 820 (C.C.P.A. 1977).

> The mandate of the court **must** issue 7 days after the expiration of the time for filing a petition for rehearing unless such a petition is filed or the time is shortened or enlarged by order. The **timely** filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court.

(Emphasis added). In the present matter, the docket sheet from the Court of Appeals reveals that the mandate did not issue until February 21, 1996, after the entry of the order denying the petition for rehearing. Jt. App. at 22-27.

It is apparent that Fed. R. App. P. 41(a) contains mandatory language that the mandate **must** issue unless a timely petition for rehearing is filed. In the present matter, the mandate did not issue on or before September 20, 1995; thus, it is apparent that the Court of Appeals, through the extension granted, considered the Petition for Rehearing to be timely filed.

Similar to the case of Missouri v. Jenkins, 495 U.S. 33 (1990), this Court should presume that the Court of Appeals withheld the mandate because, pursuant to Rule 41(a) it must do so when a timely petition for rehearing is pending. Id., at 48-49.

In addition, the actions of the Court of Appeals reveal that the order of September 25, 1995 was an extension granted to the Petitioners because the Court of Appeals transmitted the suggestion for rehearing *en banc* to the full court without an express order of the hearing panel. Pursuant to 10th Cir. R. 35.3, an untimely suggestion for rehearing *en banc* will only be transmitted to the full court upon express order of the panel. The docket sheet from the Court of Appeals reveals that an order of the panel was not issued. Jt. App. at 22-27. Again, the actions of the Court of Appeals clearly indicate that the Petition for Rehearing was timely filed.

The Court of Appeals issued an order allowing the Petitioners to file a Petition for Rehearing and Suggestion for Rehearing *En Banc*. As this Court stated in Missouri v. Jenkins,

> The [Tenth] Circuit surely knows more than we do about the meaning of its orders, and we accept its action for what it purports to be.

Id., at 49-50. The actions of the Court of Appeals conclusively reveal that the effect of the order was to make the filing of the Petition for Rehearing timely.

As the Petition for Rehearing and Suggestion for Rehearing *En Banc* were timely filed, the period in which a petition for *writ of certiorari* must be sought did not begin to run until a decision was rendered concerning the petition for rehearing. Sup. Ct. R. 13.3. See also Missouri v. Jenkins, 495 U.S. at 45. The Petition for Writ of Certiorari was filed

within ninety days after the denial of the petition for rehearing. Accordingly, this Court has jurisdiction to address the question presented and accepted for review by this Court.

B. The Petition for Rehearing was Reviewed on the Merits.

The record before this Court reflects that the merits of the Petition for Rehearing were considered by the Court of Appeals. The record reveals that on September 25, 1995, an Order was entered by the Court of Appeals allowing the Petition for Rehearing to be filed. In addition, the Court of Appeals ordered that Respondent file a response to the Petition for Rehearing.[3] This action of the Court of Appeals indicates that the Petition for Rehearing was considered on the merits.

As the First Circuit Court of Appeals stated in Denholm & McKay Co. v. Commission of Internal Revenue, 132 F.2d 243, 247-48 (1st Cir. 1942):

> A petition for rehearing may be filed out of time, in two senses; (1) it may be filed after the period prescribed by rule of court within which such petitions may be filed, but before the statutory period for appeal has expired, and (2) it may be filed after the statutory period for taking an appeal has elapsed.

[3] See Rep. App. at 1a.

> If untimely in the first sense, the court may nevertheless grant special leave for the filing of the petition for rehearing, which would indicate that the grounds urged in such petition will be considered on their merits. This is "entertainment" of the untimely petition; and the time for taking an appeal will not begin to run until the petition is disposed of. See United States v. Seminole Nation, 1937, 299 U.S. 417, 57 S.Ct. 283, 81 L.Ed. 316; Bowman v. Lopereno, 311 U.S. 262, 266, 61 S.Ct. 201, 85 L.Ed. 177.

In Bowman v. Lopereno, 311 U.S. 262 (1940), the District Court granted permission to file a late second petition for rehearing. A hearing was held and the District Court in its opinion stated:

> "This matter is before the Court (a) on a petition to review an order of this court denying review of an order to set aside adjudication; (b) on a petition to review an order of the Referee calling a meeting of creditors for electing, and electing a trustee, in the above entitled estate."
>
> . . . "The petition for review was denied."

Id., at 265, quoting Re Bowman, 110 F.2d 348, 42 Am Bankr Rep (NS) 526. This Court held that the permission granted by the District Court allowing the filing of the late petition, together with the hearing and the opinion of the court, show

that the petition for rehearing was entertained by the District Court and dealt with upon its merits. Id., at 266.

Likewise, in the present matter, the fact that the Court of Appeals granted permission to file the Petition for Rehearing and requested the Respondent file a response to the petition clearly indicates that the petition was entertained by the Court of Appeals and considered upon the merits. In addition, the fact that five judges would have granted rehearing *en banc* reveals that the merits of the petition were considered by the Court of Appeals.

The Respondent contends the order of the Court of Appeals reveals that the Court of Appeals did not review the Petition for Rehearing on the merits. The Respondent relies on Pfister v. Northern Illinois Finance Corp., 317 U.S. 144 (1942), to support its position that if an ambiguity exists as to whether the petition for rehearing was considered on the merits, the terms of the court's order should control. The Petitioners contend, however, that no ambiguity exists.

As discussed above, the actions of the Court of Appeals, much like the District Court's actions in Bowman v. Lopereno, clearly indicate that the Petition for Rehearing was considered on its merits.

The Petition for Rehearing was timely filed and considered on the merits by the Court of Appeals. Accordingly, the Petition for Writ of Certiorari filed with this Court was timely filed. Thus, this Court has jurisdiction of this matter.

PROPOSITION II

THE STATE DID NOT VIOLATE RESPONDENT'S DUE PROCESS RIGHTS WHEN RESPONDENT WAS RECLASSIFIED TO A HIGHER SECURITY LEVEL WHILE SERVING HIS JUDGMENT AND SENTENCE.

The Pre-Parole Conditional Supervision Program is Clearly Different than Parole.

The Respondent contends that the Pre-Parole Conditional Supervision Program (the "Program") cannot be distinguished from parole for the purposes of Morrissey v. Brewer, 408 U.S. 471 (1972). The Respondent then attempts to demonstrate that parole and the Program are the same and that the Program is merely an "early release". (Brief of Respondent, at 12 n. 38; 28).

The Program is significantly distinguishable from parole. In the Brief of Petitioners, many of the differences are discussed. The differences between the Program and parole include:

1. the purpose of the Program, as implemented by the State Legislature, is to reduce prison overcrowding,[4] whereas the purpose of parole is to help reintegrate the inmate into society;[5]

2. an inmate must have served at least fifteen percent (15%) of his sentence and be within one year of his parole consideration date or one year of his projected release date to be eligible for the Program,[6] whereas to be eligible for parole the inmate must have completed one-third (1/3) of his sentence;[7]

3. an inmate, after being recommended by the Pardon and Parole Board (the "Board") is placed on the Program at the discretion of the Department of Corrections ("DOC"),[8] whereas an inmate, after being recommended by the Board, is placed on parole at the discretion of the Governor of the State of Oklahoma;[9]

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[4] Okla. Stat. tit. 57 § 365 (Supp.1990).
[5] Morrissey v. Brewer, 408 U.S. at 477.
[6] Okla. Stat. tit. 57, § 365 (Supp.1990).
[7] Okla. Stat. tit. 57, § 332.7 (Supp.1993).
[8] Pet. App. at 43a-52a.
[9] Okla. Stat. tit. 57, § 332 (1991); Okla. Stat. tit. 57, § 332.7 (Supp.1993).

4. an inmate on the Program is subject to the disciplinary proceedings of the DOC;[10]

5. an inmate who fails to report as required or escapes from the Program is subject to prosecution for escape pursuant to Okla. Stat. tit. 21, § 443,[11] whereas a parolee who fails to report would only be subject to revocation of parole due to such technical violation; [12]

6. an inmate on the Program continues to serve his sentence and receives earned credits pursuant to Okla. Stat. tit. 57, § 138 (Supp.1989), whereas a parolee is not serving his sentence and, if parole is revoked, the parolee is not entitled to deduct from his sentence time spent on parole;[13]

7. an inmate on the Program cannot leave the State of Oklahoma for any reason,[14] whereas a parolee can leave the State of Oklahoma upon receiving permission;[15];

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[10] Okla. Stat. tit. 57, § 365(E) (Supp.1990).
[11] Okla. Stat. tit. 57, § 365(F) (Supp.1993).
[12] Resp. App. at 28a.
[13] Okla. Stat. tit. 57, § 350 (Supp.1987). See also Thurman v. State, 500 P.2d 1074, 1075 (Okla. Crim. App. 1972).
[14] Jt. App. at 7.
[15] Resp. App. at 27a.

8. an inmate on the Program must remain supervised at all times, whereas a parolee may be unsupervised after three years on parole;[16] and

9. an inmate on the Program must maintain full time employment or be involved in a full time educational/ vocational program,[17] whereas a parolee is not required to meet such a requirement.

In addition, as this Court stated in Morrissey, a parolee relies on an implicit promise that parole will be revoked only if he violates a condition of parole. Morrissey v. Brewer, 408 U.S. at 482. As this Court noted, in many cases, a parolee will face a lengthy incarceration if his parole is revoked. Id.

An inmate on the Program, however, has not received such an implicit promise. An inmate on the Program is clearly aware that he remains in the exclusive custody and control of the DOC. An inmate is also aware that if he does not have full time employment or is not involved in a full time educational/vocational program he will be considered a program failure and will be reclassified. An inmate is also aware that if he is denied parole he may be reclassified. An inmate on the Program is aware of the

[16] Okla. Stat. tit. 57, § 512 (Supp.1993).
[17] Jt. App. at 8.

many differences between parole and the Program. Jt. App. at 4, 5 and 9. Furthermore, if an inmate on the Program is reclassified to a higher security level, unless credits are deducted in a disciplinary proceeding, he will retain all credits earned just as any inmate reclassified by the DOC.

The Respondent alleges that parolees, just as inmates on the Program, remain within the custody of the DOC. The custody in which a parolee is considered is merely in theory only. Although a parolee is supervised by an employee of the DOC, the DOC does not retain any other control over a parolee unless or until a parole violation occurs. An inmate on the Program, however, remains within the control of the DOC at all times. As the Respondent stated, he was required to meet with a supervisor weekly and give his supervisor a weekly itinerary so that DOC would know where to locate the Respondent at all times.[18] Furthermore, an inmate on the program is subject to disciplinary proceedings of the DOC. Okla. Stat. tit. 57 § 365(E) (Supp.1990).

The respondent cites Spurlock v. State, 72 P.2d 731 (Okla. Crim. App. 1986), *rev'd* Plotner v. State, 721 P.2d 810 (Okla. Crim. App. 1986), in support of his position that a parolee remains within the custody of the DOC. In Plotner, the Oklahoma Court of Criminal Appeals reversed Spurlock for the reason that an appellant does not lose his right to appeal his conviction merely because he is granted a parole from the conviction. Thus, similar to federal law, a parolee remains "in custody" within the meaning of the habeas corpus

[18] Resp. Reply Br. at 8, filed April 13, 1995 (No. 95-5026).

statute and does not lose his ability to petition for habeas corpus relief merely because he is placed on parole. Jones v. Cunningham, 371 U.S. 236, 243 (1963).

The Respondent makes a point to draw to this Court's attention the fact that apparently many of the arguments raised in Morrissey are being raised by Petitioners in this matter. The Petitioners would assert, however, that even if the arguments are the same, the facts are completely different. As discussed in the Brief of the Petitioners and as shown above, the Program differs significantly from parole. It would work an absurdity to allow an inmate, who does not meet the eligibility requirements for parole to have the same rights and interests of an inmate who has qualified for release on parole.

The interests of an inmate on the Program and a parolee are not the same. As discussed in the Brief of the Petitioners, and as stated by this Court in Meachum v. Fano, 427 U.S. 215, 224 (1976), it is the nature of the interest involved that determines whether a liberty interest is implicated within the meaning of the Due Process Clause. Again, as shown above and fully addressed in the Brief of Petitioners, the nature of the interest of an inmate on the Program is not the same as a parolee.

CONCLUSION

An inmate on the Program does not have a constitutionally protected liberty interest in continued participation in the Program. Accordingly, the opinion of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX

TABLE OF CONTENTS

Page

APPENDIX A

Order Entered September 25, 1995 From the United States Court of Appeals for the Tenth Circuit 1a

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ERNEST EUGENE HARPER,	)	
	)	
Petitioner-Appellant,	)	
v.	)	No. 95-5026
	)	
LEROY L. YOUNG, and ATTORNEY GENERAL OF OKLAHOMA,	)	
	)	
	)	
Respondent-Appellee.	)	

ORDER
Filed September 25, 1995

Before SEYMOUR, Chief Judge, McKAY, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, HENRY, BRISCOE and LUCERO, Circuit Judges.

The court grants appellees leave to file a late petition for rehearing and suggestion for rehearing en banc.

Appellant shall file a response to the petition for rehearing and suggestion for rehearing en banc within 20 days from the date of this order.

Entered for the Court

PATRICK FISHER, Clerk

By: S/Opal A. Carter
Opal Carter, Deputy Clerk

Supreme Court, U.S.
FILED
AUG 1 1996
CLERK

(A)

No. 95-1598

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

LEROY L. YOUNG and
ATTORNEY GENERAL OF OKLAHOMA,

Petitioners,

v.

ERNEST EUGENE HARPER,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF OF AMICI CURIAE STATES OF NEVADA, CALIFORNIA, COLORADO, HAWAII, IDAHO, MONTANA, NEW YORK IN SUPPORT OF PETITIONERS

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16 pp

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QUESTION PRESENTED

Whether the Preparole Conditional Supervision Program enacted pursuant to Okla. Stat. tit. 57, § 365 (Supp. 1990) is more similar to parole or minimum security imprisonment; and, thus, whether continued participation in such program is protected by the Due Process Clause of the Fourteenth Amendment.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 3

PROPOSITION I

AN INMATE DOES NOT ACQUIRE A LIBERTY INTEREST BY PLACEMENT ON A CLASSIFICATION LEVEL WHICH ALLOWS SUCH INMATE TO RESIDE OUTSIDE A CORRECTIONAL FACILITY. ... 4

PROPOSITION II

THE TENTH CIRCUIT ERRED IN FINDING THAT THE PROCEDURAL PROTECTIONS OF MORRISSEY V. BREWER WERE WARRANTED. 8

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Page

Asherman v. Meachum,
566 A.2d 663 (Conn. 1989) 5, 6

Bell v. Wolfish,
441 U.S. 520 (1979) 3, 6

Harper v. Young,
64 F.3d 563 (10th Cir. 1995) 2

Hewitt v. Helms,
459 U.S. 460 (1983) 9

McCord v. Maggio,
910 F.2d 1248 (5th Cir. 1990) 6

Meachum v. Fano,
427 U.S. 215 (1976) 4, 5, 6, 7, 8

Montanye v. Haymes,
427 U.S. 236 (1976) 7

Morrissey v. Brewer,
408 U.S. 471 (1972) 2, 7, 9

Rhodes v. Chapman,
452 U.S. 337 (1981) 4

Wolff v. McDonnell,
418 U.S. 539 (1974) 3, 9

Table of Authorities Continued

STATUTES CITED

Cal. Penal Code § 8051 (West Supp. 1996) 6

Colo. Rev. Stat. § 17-27.5-102 (1986) 6

Nev. Rev. Stat. § 209.392 (1995) 2, 4, 6

Okla. Stat. tit. 57, § 365 (Supp. 1990) 1, 6

OTHER AUTHORITIES

U.S. Supreme Court Rule 37.4 2

No. 95-1598

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

LEROY L. YOUNG and
ATTORNEY GENERAL OF OKLAHOMA,

Petitioners,

v.

ERNEST EUGENE HARPER,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Tenth Circuit

BRIEF OF AMICI CURIAE STATES OF NEVADA, CALIFORNIA, COLORADO, CONNECTICUT, HAWAII, IDAHO, MAINE, MICHIGAN, MINNESOTA, MONTANA, NEBRASKA, TEXAS, WASHINGTON AND WYOMING IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICI CURIAE

This brief filed in support of the position asserted by the Petitioners, is submitted on behalf of the State of Nevada and other signature States (the "Amici States") through their Attorneys

General pursuant to Supreme Court Rule 37.4. The Amici States have an important interest in this case because they all operate correctional facilities in which overcrowding is or will soon be a significant issue. Thus, programs similar to Oklahoma's Preparole Conditional Supervision Program, in which inmates are allowed to reside within the community, either have been or are being enacted by the Amici States' Legislatures in an effort to eliminate excessive overcrowding within such correctional facilities.

The Court of Appeals for the Tenth Circuit held that any inmate placed on a program which allows the inmate to reside outside of a correctional facility on a full-time basis, has a liberty interest in remaining on such program. Accordingly, the Court of Appeals held that an inmate placed on a prisoner release program is entitled to the procedural protections in Morrissey v. Brewer, 408 U.S. 471 (1972) before transfer from such program. Harper v. Young, 64 F.3d 563 (10th Cir. 1995).

The State of Nevada has a residential confinement program wherein an inmate is allowed to reside outside a correctional facility. Section 5 of Nev. Rev. Stat. § 209.392 (1995) specifically states that the assignment of an inmate to such program is "[a] continuation of his imprisonment and not a release on parole" and "[f]or the purposes of NRS 209.341 [classification], an assignment to a facility of the department of prisons..." This program was enacted and is essential to assist in the alleviation of overcrowding in Nevada's correctional facilities.

The impact of being compelled to comply with the decision of the Court of Appeals would be severe on all the Amici States. A determination that a liberty interest is created by such a classification system would cause many of the Amici States to eliminate such programs due to the burden of providing a hearing pursuant to Morrissey v. Brewer merely for classification of an inmate. In addition, such a determination would discourage states

from experimenting with new procedures or programs utilized to eliminate the overcrowding dilemma. The determination of the Court of Appeals threatens to impose an enormous financial burden on the Amici States and restrict the ability of prison administrators to manage their correctional facilities. Accordingly, the Amici States submit this brief to assist the Court in the resolution of this case.

SUMMARY OF THE ARGUMENT

Due to the rapid growth of prison populations and due to financial inability to construct new correctional facilities quickly enough to accomodate the increase in inmates, many state legislatures have been forced to enact programs which allow inmates to serve a portion of their term of incarceration in a residential program. The purpose of such programs is to remedy the dilemma of overcrowding, but retain custody and control of the inmate just as if the inmate remained within the four walls of a correctional facility.

Although an inmate upon imprisonment is not wholly stripped of constitutional protections, many rights and privileges for lawfully incarcerated inmates are limited or withdrawn. Bell v. Wolfish, 441 U.S. 520, 545-546 (1979); Wolff v. McDonnell, 418 U.S. 539, 555 (1974). The withdrawal of such rights is justified by the considerations underlying our penal system. Bell, at 545-546.

One such current consideration is the problem of overcrowding. Residential confinement programs have been enacted by state legislatures to assist in the elimination of this problem, while at the same time, achieving the goals of the penal function in the criminal justice system, being:

> ...to punish justly, to deter future crime, and to return imprisoned persons to society with an improved chance of being useful, law-abiding citizens.

Rhodes v. Chapman, 452 U.S. 337, 352 (1981).

In order to reduce the problem of overcrowding and to maintain security and proper living conditions within correctional facilities, another classification level was created. This classification level allows an inmate to reside outside a correctional facility, but remain within the custody of prison officials. Nev. Rev. Stat. § 209.392 (1995), specifically provides that an inmate placed into the residential confinement program does not acquire a liberty interest when classified into the program. Likewise, in all similar programs, including the Oklahoma program under review by this Court, the nature of the program is merely a classification level. It is not by statute or by any other mechanism treated as parole by the states or their prison authorities. Accordingly, an inmate does not obtain a liberty interest in continued placement at such level. Meachum v. Fano, 427 U.S. 215 (1976).

ARGUMENT

PROPOSITION I

AN INMATE DOES NOT ACQUIRE A LIBERTY INTEREST BY PLACEMENT ON A CLASSIFICATION LEVEL WHICH ALLOWS SUCH INMATE TO RESIDE OUTSIDE A CORRECTIONAL FACILITY.

In Meachum v. Fano, 427 U.S. 215 (1976), this Court held that the Due Process Clause does not in and of itself protect

an inmate against transfer from one institution to another within the state system. This Court specifically stated:

> ...given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prisons system so long as the conditions of confinement do not otherwise violate the Constitution.

Id, 427 U.S. at 224. Due to the overcrowding dilemma which has arisen throughout our nation, many states, including Oklahoma, have chosen to create new classification levels within the states' penal systems.

One new classification level, which is called by many names, including but not limited to Preparole Conditional Supervision and Residential Confinement, allows an inmate to be transferred to a security level wherein the inmate resides within the community.[1] The decision of whether to classify the inmate into such a program is a matter of discretion within the Department of Prisons just as any decision regarding classification of an inmate. Accordingly, as stated by this Court in Meachum, to hold that the transfer or classification of an inmate from a residential program to another security level invokes the procedural protections of the Due Process Clause

> ... would subject to judicial review a wide spectrum of discretionary actions that traditionally

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[1]Many other classification levels have been enacted, including house arrest, electric home monitoring, work/study release, furloughs, half-way houses and community correctional centers.

> have been the business of prison administrators rather than of the federal courts.

Id., 427 U.S. at 225. See also Bell v. Wolfish, 441 U.S. 520, 548 (1979) (operation of correctional facilities is the province of the Legislative and Executive branches of government and not the Judicial); McCord v. Maggio, 910 F.2d 1248, 1250 (5th Cir. 1990) (classification of prisoners is within the discretion of prison officials).

Management of the local prison system is of "acute interest to the States". Meachum v. Fano, 427 U.S. at 229. State legislatures have found this classification level necessary to provide the proper living conditions and maintain security within the correctional facilities. Prison officials must be provided deference in the application of such programs. Bell v. Wolfish, 441 U.S. at 547.

The decision of the Tenth Circuit ignores the true nature of a residential confinement program. In reviewing certain of the Amici State's programs, including Nevada,[2] California[3] and Colorado,[4] as well as the Oklahoma program,[5] it is clear that the nature of each system is merely a classification level enacted to assist in the elimination of the overcrowding crisis.[6] Thus,

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[2]Nev. Rev. Stat. § 209.392 (1995).

[3]Cal. Penal Code § 8051, et seq. (West Supp. 1996).

[4]Colo. Rev. Stat. § 17-27.5-102 (1986).

[5]Okla. Stat. tit. 57, § 365 (Supp.1990).

[6]See Asherman v. Meachum, 566 A.2d 663, 668 (Conn. (continued...)

essentially, assignment to a residential confinement program is no different from assignment to any other facility or program, such as to a forestry camp, fire crew, maintenance crew or boot camp. An inmate assigned to such a program remains obligated to serve out the remainder of his sentenced term of incarceration, either within the confines of a correctional facility or within the restrictions of such program.

Unlike parole, an inmate on a residential confinement program is not "entitled to retain his liberty as long as he substantially abides by the conditions" of such a program. Morrissey v. Brewer, 408 U.S. 471, 479 (1972). Instead, an inmate can be reclassified at the discretion of prison authorities for any reason or for no reason. Accordingly, it is clear that this Court's holding in Meachum v. Fano, that an inmate holds no liberty interest in his place or degree of confinement, is controlling in this matter.

A prison transfer is not a decision which implicates the procedural protections of the Due Process Clause of the Fourteenth Amendment. Meachum v. Fano, 427 U.S. 215 (1976); Montanye v. Haymes, 427 U.S. 236 (1976). As this Court stated:

> The initial decision to assign the convict to a particular institution is not subject to audit under the Due Process Clause, although the degree of confinement in one prison may be quite different from that in another. The conviction has sufficiently extinguished the defendants' liberty

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[6](...continued)
1989), wherein the Supreme Court of Connecticut held that an inmate does not have a liberty interest in remaining on home release status. The Connecticut legislature has since repealed the home release statute.

> interest to empower the State to confine him in any of its prisons.
>
> Neither, in our view, does the Due Process Clause in and of itself protect a duly convicted prisoner against transfer from one institution to another within the state prison system. Confinement in any of the State's institutions is within the normal limits or range of custody which the conviction has authorized the State to impose.

Meachum, 427 U.S. at 224-225. An inmate transferred to a residential program does not have a constitutionally protected liberty interest in remaining at that classification level.

PROPOSITION II

THE TENTH CIRCUIT ERRED IN FINDING THAT THE PROCEDURAL PROTECTIONS OF MORRISSEY V. BREWER WERE WARRANTED.

As shown above, the Tenth Circuit did not examine the true nature of a residential confinement program when it held that a liberty interest was created merely due to transfer from a correctional facility. However, even assuming a liberty interest was created, the liberty interest is not identical to a parolee due to the numerous additional restrictions within a residential confinement program and due to the fact that an inmate in such program can be transferred from the program at the discretion of the prison authorities. Accordingly, the court must address what procedures are applicable to this matter.

This Court has consistently held that requirements imposed by the Due Process Clause are flexible and variable. A

determination of what procedures are required must be decided based upon a review of the particular situation being examined. Wolff v. McDonnell, 418 U.S. 539, 560 (1974); Hewitt v. Helms, 459 U.S. 460, 472 (1983).

As shown in Proposition I, a residential confinement program is merely a classification level in which an inmate may be placed or removed at the discretion of prison authorities. Thus, assuming any liberty interest is created upon placement at that classification level, a detailed adversary proceeding as mandated in Morrissey would not be necessary as the discretionary decision of whether to transfer an inmate would not be materially assisted by such a procedure. See Hewitt, 459 U.S. at 473-474.

In the instant matter, Mr. Harper was transferred from the residential confinement program due to denial of parole. Clearly, there would be no factual issues to be determined in an adversary proceeding. In addition, the determination of whether to transfer Mr. Harper turns largely on "'purely subjective evaluations and on predictions of future behavior'". Id., 459 U.S. at 474 (quoting Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 464 (1981)). Even though Mr. Harper did not violate the rules of the program, the prison officials may have determined that due to parole denial, Mr. Harper was more likely to flee from justice or that the safety of the community was at greater risk. Thus, as in Hewitt, the balance of such interests would lead to a conclusion that only an informal nonadversary proceeding would be required.

Although it remains the position of the Amici States that an inmate on a residential confinement program does not have a liberty interest in continued placement in such program, assuming a liberty interest has arisen, minimum procedural protections such as those set forth in Hewitt would be sufficient to ensure that an inmate is not arbitrarily transferred to a higher classification.

CONCLUSION

The judgment of the United States Court of Appeals for the Tenth Circuit should be reversed.

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